

1998

## Toward Fifty Years of Constitutionalism and Fundamental Rights in India: Looking Back to See Ahead (1950-2000)

Vijayashri Sripati

Follow this and additional works at: <http://digitalcommons.wcl.american.edu/auilr>



Part of the [International Law Commons](#)

---

### Recommended Citation

Sripati, Vijayashri. "Toward Fifty Years of Constitutionalism and Fundamental Rights in India: Looking Back to See Ahead (1950-2000)." *American University International Law Review* 14, no. 2 (1998): 413-495.

This Article is brought to you for free and open access by the Washington College of Law Journals & Law Reviews at Digital Commons @ American University Washington College of Law. It has been accepted for inclusion in *American University International Law Review* by an authorized administrator of Digital Commons @ American University Washington College of Law. For more information, please contact [fbrown@wcl.american.edu](mailto:fbrown@wcl.american.edu).

# TOWARD FIFTY YEARS OF CONSTITUTIONALISM AND FUNDAMENTAL RIGHTS IN INDIA: LOOKING BACK TO SEE AHEAD (1950-2000)

VIJAYASHRI SRIPATI \*

INTRODUCTION .....	415
I. INDIA'S FIRST HOUR OF FREEDOM .....	420
A. FRAMING THE CONSTITUTION .....	420
B. THE ORIGINAL CONTENT OF FUNDAMENTAL RIGHTS .....	427
1. <i>Right to Equality</i> .....	428
2. <i>Right to Fundamental Freedoms</i> .....	430
3. <i>Procedural Rights</i> .....	430
4. <i>Right Against Exploitation</i> .....	431
5. <i>Right to Freedom of Religion</i> .....	432
6. <i>Cultural and Educational Rights</i> .....	433
7. <i>Right to Property</i> .....	433
8. <i>Right to Constitutional Remedies</i> .....	433
C. THE STORY OF THE DUE PROCESS CLAUSE .....	434

\* Vijayashri Sripati, LL.B., Osmania University, India, 1989; Rotary International Graduate Scholar (1990-91); LL.M., American University Washington College of Law, May 1991; British Chevening Scholar (1995-96); M.A. (International Law & Politics) University of Hull, England, January 1997; Recipient of the Josephine Onoh Memorial Prize in Public International Law awarded by the University of Hull, England, January 1997.

I dedicate this essay to my father, Mr. Rammohan Rao Sripati, who has nurtured my love for learning and writing since childhood. I also wish to express my deeply felt gratitude to Dr. Mark Gibney, Professor, Department of Political Science, University of North Carolina, Asheville; Mr. Gary McCann, Director, Law Library, American University Washington College of Law, Washington, D.C.; Ms. Thilaka Kiruparajah, Undergraduate Student, University of Toronto, Canada; Mr. Richmond A. Bonney, Doctoral Student, University of Hull, England; and my sister, Mrs. Bhanushri Castelino, for assisting me greatly in collecting research material for this article. A special thanks is due to Mr. Stefan Meisner and his staff for their excellent editorial assistance.

D. THE RETURN OF DUE PROCESS—INFUSION OF ITS SUBSTANCE INTO THE CONSTITUTION .....	436
II. JUDICIAL PROTECTION OF FUNDAMENTAL RIGHTS .	439
A. EXPANDING CONTENT OF FUNDAMENTAL RIGHTS .....	442
B. SCOPE OF THE FUNDAMENTAL RIGHTS .....	447
C. ANALYSIS .....	448
D. REMEDIES FOR VIOLATIONS OF RIGHTS .....	452
E. INNOVATIVE & AFFIRMATIVE REMEDIES .....	453
III. INDIAN CONSTITUTIONALISM AND INTER- NATIONAL HUMAN RIGHTS .....	459
A. THE INDIAN CONSTITUTION AND THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS.....	461
B. THE EMERGENCY PROVISIONS IN THE INDIAN CONSTITUTION AND THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS.....	464
C. THE INDIAN CONSTITUTION AND THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL, AND CULTURAL RIGHTS.....	466
D. INTERNATIONAL HUMAN RIGHTS LAW HAS INFORMED INDIAN CONSTITUTIONAL JURISPRUDENCE .....	468
E. USE OF CUSTOMARY INTERNATIONAL LAW.....	469
IV. SUPREMACY OF THE CONSTITUTION .....	471
A. SHADES OF FASCISM—THE CURRENT PROPOSALS FOR AMENDING THE CONSTITUTION .....	475
B. UPHOLDING CONSTITUTIONAL SUPREMACY .....	478
C. IS THE “BASIC STRUCTURE” DOCTRINE THE LAST HOPE? ...	480
V. HOW CAN CONSTITUTIONALISM BE STRENGTH- ENED IN INDIA?.....	481
A. THE JUDICIARY AND THE SOCIAL ACTION LITIGATION MOVEMENT .....	481
B. CAMPAIGN TO ERADICATE ILLITERACY .....	485
C. NATIONAL SECURITY AND FUNDAMENTAL RIGHTS .....	487
D. A THIRD FREEDOM STRUGGLE? .....	488
1. <i>Case for a Robust Civil Society</i> .....	489
2. <i>Bold Action Needed</i> .....	490
3. <i>Secularism in Danger: Bharatiya Janata Party and             the Hindutva Agenda</i> .....	491
4. <i>Battle Against Hindutva</i> .....	494
CONCLUSION .....	495

## INTRODUCTION

Fifty years ago, fundamental political changes took place around the world. World War II ended,<sup>1</sup> as well as the dismantling of the monumental British Empire, which gave birth to many independent states.<sup>2</sup> Vanquished nations—Germany, Italy, and Japan—and newly independent former colonies in Asia and Africa embarked on the difficult task of establishing “rule of law”<sup>3</sup> governments. Western style constitutions sensitive to human rights and embodying judicial review began to appear in Japan (1947),<sup>4</sup> Italy (1948),<sup>5</sup> Germany (1949),<sup>6</sup> and India (1950).<sup>7</sup> The Holocaust and other infamous bru-

---

1. See ERIK GOLDSTEIN, *WAR AND PEACE TREATIES 1816-1991*, at 69 (1992) (stating that the final conflict of the Second World War, the Pacific War of 1941-45, concluded with Japan's surrender on August 10, 1945).

2. See JAMES CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* 404 (1979) (discussing the United Kingdom's loss since 1920 of a massive empire).

3. See generally Richard H. Fallon, Jr., “*The Rule of Law*” as a Concept in Constitutional Discourse, 97 COLUM. L. REV. 1 (1997) (providing an extensive discussion of the “Rule of Law Ideal,” which is generally contrasted with the “Rule of Men”). Essentially, under a “Rule of Law” government, the law is “fixed and publically known in advance of application, so that those applying the law, as much as those to whom it is applied can be bound by it.” *Id.* at 3.

4. See T.S.Y. Lee & Osamu Nishi, *Japan*, in IX CONSTITUTIONS OF THE COUNTRIES OF THE WORLD 1, 2-3 (Albert P. Blaustein & Gisbert H. Flanz eds., 1990) (stating that the Constitution of Japan came into effect in 1947, and that respect for human rights and due process are fundamental principles of the Constitution).

5. See Gisbert H. Flanz, *Italy*, in IX CONSTITUTIONS OF THE COUNTRIES OF THE WORLD, *supra* note 4, at 1, 15-16 (stating that the post-World War II Italian Constitution came into effect in 1948, and that creation of a Constitutional Court and protection of fundamental rights were components of the Constitution).

6. See Robert Spencer, *The Origins of the Federal Republic of Germany, 1944-1949*, in POLITICS AND GOVERNMENT IN GERMANY, 1944-1994: BASIC DOCUMENTS 1, 5 (Carl Christoph Schweitzer et al. eds., 1995) (stating that the German Constitution, or Basic Law, was adopted in 1949); Eckart Klein, *The Concept of the Basic Law*, in MAIN PRINCIPLES OF THE GERMAN BASIC LAW 15, 16 (Christian Starck ed., 1983) (stating that individual liberty is at the core of the Basic Law); Gunnar Folke Schuppert, *The Constituent Power*, in MAIN PRINCIPLES OF THE GERMAN BASIC LAW 37, 51 (Christian Starck ed., 1983) (stating that “the process of interpretation through the Federal Constitutional Court is of central importance for the implementation and elucidation of the [German] Constitution.”).

7. See Shri P.M. Bakishi, *India*, in VII CONSTITUTIONS OF THE COUNTRIES OF

talities spurred nations to devise collective means of ensuring lasting peace.<sup>8</sup> Certain nations formed the United Nations, and with it the modern human rights movement.<sup>9</sup> In 1948, during the third session of the United Nations, the General Assembly adopted the Universal Declaration of Human Rights (“Universal Declaration”)<sup>10</sup> and projected constitutionalism onto the world stage. The Universal Declaration enunciates important human rights that were flagrantly violated during the pre-war period. Most nations hoped that the incorporation and gradual implementation of these fundamental rights within the newly independent countries would serve as the starting point for genuine constitutionalism in the world.

More recently, the transmuted and newly independent states of the former Soviet Union wrote constitutions, adopted bills of rights, and established judicial review.<sup>11</sup> In Great Britain, a nation whose political traditions lean toward parliamentary supremacy, there is a debate on the need for a written constitution with a bill of rights.<sup>12</sup> In Europe and Latin America and later the other parts of the world, constitutionalism and judicial review have “proved to be one of the West’s most important exports.”<sup>13</sup> Indeed, the past fifty years represent an

---

THE WORLD i, v (Albert P. Blaustein & Gisbert H. Flanz eds., 1994) (stating that the Constitution of India was enacted on January 26, 1950); INDIA CONST. pt. III, *reprinted in* VII CONSTITUTIONS OF THE COUNTRIES OF THE WORLD, *supra*, at 1, 31 (enumerating fundamental rights); *Id.* pt. V, ch. IV (creating the Supreme Court of India with authority over the laws of India).

8. See Hajo Holborn, *Introduction to WAR AND PEACE AIMS OF THE UNITED NATIONS: SEPTEMBER 1, 1939–DECEMBER 31, 1942* i, ix–xv (Louise W. Holborn ed., 1943) (discussing the need for, and creation of, the United Nations during the period 1939–1942).

9. See *id.* (delineating the aims of the United Nations, including, but not limited to human rights).

10. *Universal Declaration of Human Rights*, G.A. Res. 71 U.N., U.N. Doc. A/810 (1948).

11. See Henry H. Perritt, Jr. & Christopher J. Lhulier, *Information Access Rights Based on International Human Rights Law*, 45 BUFF. L. REV. 899, 900 (1997) (“The effort to build the rule of law in former communist countries is supported by the development of constitutionalism, implemented through independent constitutional courts in the newly independent states.”).

12. See Bruce Ackerman, *The Rise of World Constitutionalism*, 83 VA. L. REV. 771, 772 (1997) (“Even the British are debating the need for a new fangled written constitution”).

13. *Id.* at 781.

extraordinary period for constitutionalism throughout the world.

This article focuses on the development of constitutionalism during the last fifty years and recommends means for strengthening it in India in the next century. January 26th, 2000, marks the fiftieth anniversary of the Indian Constitution.<sup>14</sup> The Constitution—the National Charter of Liberties—sets forth the fundamental rights of approximately one billion people, reflecting an amazing kaleidoscope of castes, religions, languages, and economic and social backgrounds. The triumph of democracy in India and the survival of its Constitution for fifty years are significant achievements. Yet, the continuing success of constitutionalism in India has far-reaching implications in the future for international peace and security—particularly in Asia, a region that has faced recent challenges to democracy.

Furthermore, India can serve as a laboratory for testing difficult questions of constitutional law arising in the United States since India purposefully incorporated the quintessential aspects of United States constitutionalism.<sup>15</sup> These aspects include the concepts of a written constitution, court-policed constitutional liberties,<sup>16</sup> and constitutional supremacy. With regard to human rights, the impact of the United States Constitution was “massive” and the “borrowings direct.”<sup>17</sup> Further, India’s founding fathers eagerly emulated the

---

14. India gained independence from British rule on August 15, 1947. See Sharad D. Abhyankar, *India, in VII CONSTITUTIONS OF THE COUNTRIES OF THE WORLD*, *supra* note 7, at 1 (providing an overview of the history of India). On attaining independence India was partitioned into two sovereign nations: India and Pakistan. See Vijayashri Sripati, *Human Rights in India: Fifty Years After Independence*, 26 *DENV. J. INT’L L. & POL.* 93, 96 n.17 (1997) (noting further that “[w]hat ensued was a panicky exodus of Muslims fleeing to Pakistan and Hindus fleeing to India and a communal carnage in which about a million lives were lost.”).

15. See TRIMBAK KRISHNA TOPE, *THE CONSTITUTION OF INDIA* 37 (1971) (discussing the similarities and differences in the United States and Indian constitutions).

16. See Soli Sorabjee, *Equality in India and the United States, in CONSTITUTIONALISM AND RIGHTS* 94, 96-97 (Louis Henkin & Albert J. Rosenthal eds., 1990).

17. Andrzej Rapaczynski, *Bibliographical Essay: The Influence of United States Constitutionalism Abroad, in CONSTITUTIONALISM AND RIGHTS, supra* note 16, at 447-49.

“American judicial institution and its constitutional function”<sup>18</sup> since these features were perceived to contribute significantly to the achievement of a freer and fairer society. India is, in this sense, a “constitutional offspring” of the United States.<sup>19</sup> The rise of world constitutionalism, however, has failed to draw the attention of scholars, lawyers, and judges in North America.<sup>20</sup> Indeed, these groups often ignore the constitutional processes of foreign countries, despite the potential benefits of such inquiry. Consequently, this article suggests that the United States and other countries can learn from the experiences—past and present—of Indian constitutionalism.

Essentially, this article discusses three strands of Indian constitutional thought. They are: 1) the emphasis on fundamental rights; 2) the protection of fundamental rights by a judiciary vested with the power of judicial review; and (3) the supremacy of the Constitution. The last five decades are examined in terms of these three themes, emphasizing processes and trends rather than events.

Overall, this article comprises five parts. Part I examines the framing of the Indian Constitution and its fundamental rights provisions. Part II deals with the first two themes of this article—fundamental rights and fundamental rights’ protection by the Judiciary. Specifically, this section explores the Supreme Court’s exercise of judicial review since 1950, and analyzes the steady expansion of fundamental rights and novel procedural innovations that the Court has introduced under the auspices of Social Action Litigation (“SAL”) or Public Interest Litigation (“PIL”) beginning in the late 1970s.

Part III covers Indian constitutionalism and international human rights. Both the Indian Constitution and the International Bill of Rights draw heavily from the United States Constitution and its Bill of Rights. This section probes the similarities and differences between the human rights provisions in the Indian Constitution, and the

---

18. Louis Henkin, *Introduction: The United States Constitution Abroad*, in CONSTITUTIONALISM AND RIGHTS, *supra* note 16, at 15.

19. See Ackerman, *supra* note 12, at 771, 772 n.4 (quoting *United States v. Then*, 56 F.3d 464, 469 (2d Cir. 1995)) (stating countries that have adopted judicial review are ‘constitutional offspring[s]’ of the United States).

20. See *id.* at 772-73 (discussing American scholars, constitutional lawyers, and American judges’ inward view of constitutional law).

International Covenant on Civil and Political Rights ("ICCPR")<sup>21</sup> and the International Covenant on Economic, Social, and Cultural Rights ("ICESCR").<sup>22</sup> Part III also analyzes the positive influence of international developments on Indian constitutional jurisprudence. Finally, this section argues that Indian courts must continue to respect international human rights norms while interpreting constitutional provisions in order to satisfy India's constitutional mandate "to foster respect for international law and treaty obligations."<sup>23</sup>

Part IV discusses the supremacy of the Constitution in India and part V suggests ways that India can maintain and strengthen the goals and precepts of the 1950 Constitution of India, which are threatened by the reigning government. Presently, a coalition government headed by the Bharatiya Janata Party ("BJP") governs India. The BJP is a political party that owes allegiance to a Hindu fundamentalist organization, Rashtriya Swayam Sevak Sangh ("RSS").<sup>24</sup> The RSS's influence is penetrating the various branches of the Indian government and severely imperiling Indian constitutional tenets such as parliamentary democracy, secularism, freedom of speech and expression, women's rights, equality, and social justice.<sup>25</sup>

The BJP government has called for a review of the Constitution and proposed three controversial changes. Since 1950, the successive governments of India have amended the constitution an extraordinary number of times and the document has yet to emerge as an "all pow-

---

21. *International Covenant on Civil and Political Rights*, G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1967).

22. *International Covenant on Economic, Social and Cultural Rights*, G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, at 49, U.N. Doc. A/6316 (1967).

23. See INDIA CONST. pt. IV, art. 51, reprinted in VII CONSTITUTIONS OF THE COUNTRIES OF THE WORLD, *supra* note 7, at 1, 80.

24. See Bipan Chandra, *Jan Sangh: The BJP's Predecessor*, HINDU, May 11, 1998, at 10 (tracing the history of the Bharatiya Janata Party ("BJP")). BJP means "The Indian People's Party." See *id.* In February 1998, the BJP captured merely 25 percent of the vote in India's general elections. See *id.* BJP is the political manifestation of Rashtriya Swayam Sevak Sangh ("RSS"), which is a combined religious and cultural organization founded by M.S. Golwalker in 1925. See *id.* RSS was banned in 1993 after it engineered the destruction of a mosque at Ayodhya. See *id.*

25. See *id.* (noting that the RSS retains "tight ideological and organizational control over the BJP"). Many fear RSS's influence since its organizational goal is to impose Hinduism as the national religion of India. See *id.*



erful symbol of national identity and democratic commitment.”<sup>26</sup> Therefore, part IV considers the theme of constitutional supremacy against the history of the amendment process, focusing on the BJP government’s proposals for change. The section ultimately concludes that there is no need to modify the Constitution. Instead, there is a need for leaders of integrity to guide and reinvigorate the existing institutions of governance.

Part V specifically provides recommendations to the government and citizens of India for guaranteeing true democracy and liberty in the country. It is important to remember that the Indian Constitution stood sadly suspended for two years, June 1975 through March 1977, during the phony Emergency declared by the Indira Gandhi government.<sup>27</sup> During this period, the government suspended civil liberties, political leaders were detained without trial, and there were severe restrictions on the freedom of the press.<sup>28</sup> Fortunately, Indians waged the second non-militant freedom struggle and restored democracy.

Today, on the eve of the fiftieth anniversary of the Republic, although there is no emergency in force, the BJP’s actions and policies, however, point to a distant thunder. Consequently, this article urges people in the subcontinent to be vigilant and recognize the subtle and severe threats that the BJP poses to the nation. Indians must begin to wage a third freedom struggle if democracy, liberty, and constitutionalism in general, are to be truly alive in India.

## I. INDIA’S FIRST HOUR OF FREEDOM

### A. FRAMING THE CONSTITUTION

December 9, 1946 marked India’s first hour of freedom. On this day the Constituent Assembly convened to embark on the awesome endeavor of framing a constitution that was acceptable to all sections

---

26. See Ackerman, *supra* note 12, at 783.

27. See *Worst Legacy of Emergency Persists*, HINDU, June 24, 1998 (discussing Indira Gandhi’s nineteen-month Emergency as the period when India “ceased to be a democracy”); see also *infra* Part III.B (discussing the emergency provisions of India’s constitution).

28. See Sripati, *supra* note 14, at 107 n.105 (stating that the “national press was gagged and civil liberties were drastically curtailed”).

of free India.<sup>29</sup> As World War II progressed, India's freedom fighters carried on their relentless struggle for *purna swaraj*—total freedom—in the face of British intransigence.<sup>30</sup> In 1942, the Quit India Movement emerged and slogans of “Quit India”—the daring declaration coined by Mahatma Gandhi—echoed all over India.<sup>31</sup> In the aftermath of the war and with a change of the government in Great Britain, the political climate became more conducive to India's demand for freedom. Ultimately, British intransigence yielded and the new labor government created a Constituent Assembly for India in the Cabinet Mission Plan of 1946.<sup>32</sup>

The Constituent Assembly convened for its inaugural session in Delhi on December 9, 1946. Dr. Satchinanda Sinha, a jurist and the Assembly's oldest member, served as the provisional president of the Constituent Assembly.<sup>33</sup> In his brilliant inaugural speech, Dr. Sinha urged the members to follow the approach of America's founding fathers in Philadelphia, namely one of agreement and compromise.<sup>34</sup> He invited the members to carefully study the provisions of the

29. See Maureen B. Callahan, *Cultural Relativism and the Interpretation of Constitutional Texts*, 30 WILLAMETTE L. REV. 609, 611 (1994) (referring to the Constituent Assembly Debates of Dec. 9, 1946).

30. See VIDYA DHAR MAHAJAN & R.R. SEHTI, CONSTITUTIONAL HISTORY OF INDIA 385 (3d ed. 1956) (providing freedom fighters arguments for ending British rule “on which depend the future of the war and the success of freedom and democracy”). See generally PANCHANAND MISRA, THE MAKING OF INDIA'S REPUBLIC: SOME ASPECTS OF INDIA'S CONSTITUTION IN THE MAKING 23 (1966) (discussing the political, economic, and social origins of the Indian Constitution).

31. See MAHAJAN & SEHTI, *supra* note 30, at 384-89 (describing the “Quit India” movement). The “Quit India” resolution, adopted by the All-India Congress Committee reads in part as follows:

The Committee approves of and endorses that . . . the immediate ending of British rule in India is an urgent necessity, both for the sake of India and for the success of the cause of the United Nations. The continuation of that rule is degrading and enfeebling India and making her progressively less capable of defending herself and of contributing to the cause of world freedom.

*Id.*

32. See MISRA, *supra* note 30, at 4 (stating that a reluctant British government conceded to India's demand for a sovereign Constituent Assembly).

33. See Callahan, *supra* note 29, at 611 (describing the Constituent Assembly).

34. See *id.* (noting that the Constituent Assembly would concentrate on the United States Constitution more heavily than on any other constitution).

United States Constitution "not necessarily for wholesale adoption but for the judicious adaptation of its provisions to the necessities and requirements of your own country [India] with such modifications as may be necessary owing to the peculiar conditions of our [India's] social, political and economic life."<sup>35</sup> In drafting the Constitution, the framers drew ideas freely from foreign constitutions, but as the Assembly Chairman's remarks reflect, the United States Constitution was undoubtedly the principal model. India's first Prime Minister, Jawaharlal Nehru, acknowledged this fact in an address to the United States Congress by announcing, "we have been greatly influenced by your own constitution."<sup>36</sup>

The Constituent Assembly drafted the Constitution over a course of three years. What emerged after thirty-six months of protracted and animated deliberations was the longest constitution ever drafted in the world.<sup>37</sup> The Constitution's evocative preamble<sup>38</sup> vests all sovereignty in the people and thus bears a remarkable resemblance to that of the United States Constitution.<sup>39</sup> From the very beginning, however, the framers opposed adopting the American presidential system.<sup>40</sup> The Indian Constitution therefore embodies the blueprint of

35. See VIDYA MAHAJAN & R.R. SEHTI, CONSTITUTIONAL HISTORY OF INDIA 122 (1988).

36. See Sorabjee, *supra* note 16, at 96 (quoting Jawaharlal Nehru).

37. See ANUP CHAND KAPUR, CONSTITUTIONAL HISTORY OF INDIA 1765-1790, at 476 (1970) (noting that the Indian Constitution originally consisted of 395 articles and 9 schedules and its text covered 254 pages).

38. See INDIA CONST. preamble, reprinted in VII CONSTITUTIONS OF THE COUNTRIES OF THE WORLD, *supra* note 7, at 1, 21. The original preamble reads as follows:

We, THE PEOPLE OF INDIA, having solemnly resolved to constitute India into a SOVEREIGN, SOCIALIST, SECULAR AND DEMOCRATIC REPUBLIC and to secure to all its citizens: JUSTICE, social, economic and political; LIBERTY of thought, expression, belief faith and worship; EQUALITY of status and of opportunity; and to promote among them all FRATERNITY assuring the dignity of the individual and the unity and the integrity of the Nation; IN OUR CONSTITUENT ASSEMBLY this twenty-sixth day of November 19, 1949, do HEREBY ADOPT, ENACT AND GIVE TO OURSELVES THIS CONSTITUTION.

*Id.*

39. See U.S. CONST. preamble.

40. See Callahan, *supra* note 29, at 611 (stating that "Indian acceptance of a centralized parliamentary form of government was 'nearly universal.'").

a Westminster parliamentary-style government.<sup>41</sup> India is thus indebted to Great Britain, among other things, for its basic political structure. The framers were also disinclined to adopt the American model of federalism, which entails a weak federal government.<sup>42</sup> The Indian Constitution is a federal constitution with a unitary bias. It establishes a "Union" of states with a strong central government. The Constituent Assembly structured the Constitution to be the highest law of the land, supreme over all other laws including the acts of legislature.<sup>43</sup> Parliament therefore could not amend the Constitution by ordinary legislation, but had to follow a difficult amending process of constitutional character.<sup>44</sup> This aspect renders the constitution rigid in some respects and flexible in some others.<sup>45</sup>

The framers etched into this supreme law of the land an impressive array of fundamental rights—basic human rights—that constitute the conscience of the Constitution.<sup>46</sup> The framers also vested the Supreme Court with the power to declare the law,<sup>47</sup> and to quash as

---

41. See KAPUR, *supra* note 37, at 476 (discussing the parliamentary form of government in India).

42. See P.K. Tripathi, *Perspectives on the American Constitutional Influence on the Constitution of India*, in CONSTITUTIONALISM IN ASIA, ASIAN VIEWS ON AMERICAN INFLUENCE, 56, 63-72 (Lawrence W. Beer ed., 1979) (describing the deliberations of the Constituent Assembly concerning the United States form of government).

43. See KAPUR, *supra* note 37, at 501.

44. See Eli Katz, *On Amending Constitutions: The Legality and Legitimacy of Constitutional Entrenchment*, 29 COLUM. J.L. & SOC. PROBS. 251, 257 n.21 (1996) ("The Indian Constitution . . . allows for amendments by a simple majority of Parliament, but the process is made more difficult by the Indian Supreme Court's interpretation of limits on the amending power of Parliament."); see also INDIA CONST. pt. XX, art. 368, reprinted in VII CONSTITUTIONS OF THE COUNTRIES OF THE WORLD, *supra* note 7, at 1, 247 (delineating the process Parliament must follow to amend the Constitution).

45. See Katz, *supra* note 44, at 270 (stating that the "Indian Constitution strikes a balance between the British 'flexibility' and American rigidity" in terms of its amendability).

46. See INDIA CONST. pt. III, arts. 12-35, reprinted in VII CONSTITUTIONS OF THE COUNTRIES OF THE WORLD, *supra* note 7, at 1, 31-75 (providing Indians' fundamental rights).

47. See *id.* pt. IV, ch. IV, art. 141 ("The law declared by the Supreme Court shall be binding on all courts within the territory of India."). Thus, the Supreme Court heads the unified judicial system in India and all laws it declares are binding

unconstitutional any law or order that transgresses any fundamental right, a power otherwise known as judicial review.<sup>48</sup> Significantly, access to the apex court to issue writs enforcing fundamental rights is itself a fundamental right.<sup>49</sup> Even more notably, the framers deemed the Court to be part of the State. The Court was envisaged to actively participate in the transformation of India from a feudal society into that of an egalitarian one, within the parameters of the Constitution.<sup>50</sup> The Judiciary was to be an arm of the "social revolution" upholding the equality that Indians had longed for during colonial days but remained elusive.<sup>51</sup>

One of the most distinctive features of the Indian Constitution is the inclusion of social justice provisions, which the United States Constitution does not expressly contain. Part IV of the Indian Constitution<sup>52</sup> enumerates certain Directive Principles of State Policy, re-

---

on all courts in the Indian Union. *See id.* The highest courts in each of the states comprising the Indian Union are the High Courts. *See id.* pt. VI, ch. V, art. 214 ("There shall be a High Court for each state."). Appeals from the High Courts are brought to the Supreme Court pursuant to articles 132, 133, and 134 of the Indian Constitution. *See id.* pt. V, ch. IV, art. 132 (providing the text of the Constitution concerning appellate jurisdiction of Supreme Court in appeals from High Courts in certain cases); *id.* art. 133 (providing the text of the Constitution concerning appellate jurisdiction of Supreme Court from High Courts in regard to civil matters); *id.* art. 134 (providing the text of the Constitution concerning appellate jurisdiction of Supreme Court from High Courts in regard to criminal matters).

48. *See* INDIA CONST. pt. III, art. 13 *reprinted in* VII CONSTITUTIONS OF THE COUNTRIES OF THE WORLD, *supra* note 7, at 1, 33-34 (discussing laws that are inconsistent with or in derogation of Indians' fundamental rights) Article 13 states:

- (1) All laws in force on the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void.
- (2) The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void.

*Id.*

49. *See id.* art. 32 (ensuring the right to access the Supreme Court to enforce fundamental rights).

50. *See* GRANVILLE AUSTIN, THE INDIAN CONSTITUTION: CORNERSTONE OF A NATION 167 (1966) (stating that the Supreme Court functions was to protect the social revolution).

51. *See id.*

52. *See* INDIA CONST. pt. IV, *reprinted in* VII CONSTITUTIONS OF THE

flecting a concept from the Constitution of Eire.<sup>53</sup> These principles, though not judicially enforceable,<sup>54</sup> are nevertheless fundamental in the governance of the country. Specifically, the Principles articulate the socio-economic responsibility of the State towards its citizens by securing for all citizens just and humane conditions of work and maternity relief,<sup>55</sup> compulsory education for all children up to the age of fourteen,<sup>56</sup> free legal services to all indigent persons,<sup>57</sup> and the establishment of sound international relations.<sup>58</sup> Basically, these provisions uphold the spirit of the Indian Constitution as a "Social Document" that embodies twentieth century socio-economic goals.<sup>59</sup>

Another distinctive feature and basic tenet of the Indian Constitution is secularism. Indeed, secularism is one of the pillars upon which India's democratic political edifice is mounted.<sup>60</sup> The Indian version of

COUNTRIES OF THE WORLD, *supra* note 7, at 1, 76-80 (containing the Directive Principles of State Policy).

53. See KAPUR, *supra* note 31, at 463 (stating that the ideological portions of the Indian Constitution were drawn from the Constitution of the United States and the Constitution of Eire).

54. See INDIA CONST. pt. IV, art. 37, reprinted in VII CONSTITUTIONS OF THE COUNTRIES OF THE WORLD, *supra* note 7, at 1, 76 (stating "[t]he provisions contained in this Part shall not be enforceable by any court, but the principles laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making law.>").

55. *Id.* art. 42 ("The State shall make provision for securing just and humane conditions of work and for maternity relief.>").

56. *Id.* art. 45 ("The State shall endeavour to provide, within a period of ten years from the commencement of this constitution, for free and compulsory education for all children until they complete the age of fourteen years.>").

57. *Id.* art. 39A ("The State shall secure that the operation of the legal system promotes justice, on a basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable legislation or schemes in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities.>").

58. See *id.* art. 51 ("The State shall endeavour to (a) promote international peace and security; (b) maintain just and honourable relations between nations; (c) foster respect for international law and treaty obligations in the dealings of organised peoples with one another; and (d) encourage settlement of international disputes by arbitration.>").

59. See Callahan, *supra* note 29, at 630 (stating that "social and economic reform were of primary importance to the Indian framers").

60. See KAPUR, *supra* note 37, at 502 (stating that the Indian Constitution guarantees freedom from religious and communal prejudice).

secularism, however, differs from the liberal democratic model because it is not characterized by the separation of state and religion.<sup>61</sup> Rather, constitutional discourse on secularism focuses on the following three principles: 1) freedom of religion;<sup>62</sup> 2) citizenship and the right to equality<sup>63</sup> and non-discrimination;<sup>64</sup> and 3) toleration based on the principle of equal respect for all religions.<sup>65</sup> Some scholars have opined that India does not have all the features of a secular state.<sup>66</sup> Although the Constitution permits state intervention in religious affairs, it upholds the principle of an “absence of a legal connection between the state and a particular religion.”<sup>67</sup> India’s commitment to the concept of secular-

61. See *id.* (noting that the Indian Constitution does not contain a provision prohibiting political activity by religious groups).

62. See INDIA CONST. pt. III, art. 25, reprinted in VII CONSTITUTIONS OF THE COUNTRIES OF THE WORLD, *supra* note 7, at 1, 61-62 (guaranteeing “[f]reedom of conscience and free profession, practice and propagation of religion”); *Id.* art. 26 (guaranteeing Indians “[f]reedom to manage religious affairs”).

63. See INDIA CONST. pt. III, art. 14, reprinted in VII CONSTITUTIONS OF THE COUNTRIES OF THE WORLD, *supra* note 7, at 1, 35 (“The State shall not deny to any person equality before the law or the equal protection of the laws within the territory.”).

64. See *id.* art. 15 (guaranteeing “[p]rohibition of discrimination on grounds of religion, race, caste, sex or place of birth.”).

65. See *id.* art. 25 (entitling citizens of all religions to equal rights). The notion of secularism as “equal respect for all religions” owes its origin to the father of the Nation, Mahatma Gandhi, who was averse to the separation of religion and politics. Indeed, in bringing about the greatest social mobilization in world history in the twentieth century, Gandhi also relied upon a “political idiom derived from the discourse of devotional theism.” Ravinder Kumar, *Political Actor as Social Prophet*, FRONTLINE, Mar. 6, 1998, at 72, 74. His message for political freedom therefore struck a responsive chord in the minds of thousands of Indians, cutting across different religious communities in British India—Hindus, Muslims, Christians, and Sikhs. See *id.*

Gandhi accordingly, envisaged a polity based on the *Saarva Dharma Sambhava* principle—equal respect for all religions. Although the Karachi resolution of 1931 called for state neutrality in regard to all religions, it was Gandhi’s thinking that dominated the constitutional discourse during the making of the constitution and thereafter. By contrast, Jawaharlal Nehru, India’s first Prime Minister, advocated a strong separation of the state and politics; and, in fact, confessed that building a secular state in a religious society had been one of his toughest tasks as Prime Minister. See generally *id.* at 72-75.

66. See, e.g., DONALD EUGENE SMITH, INDIA AS A SECULAR STATE 133 (1964) (discussing secularism in India).

67. *Id.*

ism is further buttressed by the constitutional prohibitions on religious instruction in state schools,<sup>68</sup> taxation in support of any religion,<sup>69</sup> and also by the fundamental duty of all citizens to “promote harmony and the spirit of common brotherhood amongst all the people of India transcending religious . . . diversities.”<sup>70</sup> These provisions reflect the founding fathers’ unwavering commitment to establishing a democratic India, free of all bigotry.

The Indian Constitution makes a striking departure from its American model by permitting preventive detention and providing for the declaration of an Emergency. The Constitution not only mandates preventive detention even during peacetime,<sup>71</sup> but also orders the suspension of certain non-derogable fundamental rights during an emergency.<sup>72</sup> The Constitution tolerates such intrusions into individual liberty mostly because of the peculiar socio-political milieu in which the Constitution was drafted rather than the framers’ insouciance with individual liberties.

## B. THE ORIGINAL CONTENT OF FUNDAMENTAL RIGHTS

Did the idea of guaranteeing human rights to Indians sprout in the minds of the founding fathers on the eve of independence? No. Indeed, a great patriot, Lokmanya B. Tilak, declared in 1895 to the British government, “*Swaraj mera janma sidh adhikar hai.*”<sup>73</sup> Of greater note, unlike some of Britain’s former colonies that rejected the idea of an entrenched bill of rights in their constitutions,<sup>74</sup> Indian

68. See INDIA CONST. pt. III, art. 28, cl. 1, *reprinted in VII CONSTITUTIONS OF THE COUNTRIES OF THE WORLD*, *supra* note 7, at 1, 64 (stating “[n]o religious instruction shall be provided in any educational institution wholly maintained out of state funds.”).

69. See *id.* art. 27 (stating “[n]o person shall be compelled to pay any taxes, the proceeds of which are specifically appropriated in payment or expenses for the promotion or maintenance of any particular religion or religious denomination.”).

70. *Id.* art. 51A (e).

71. See *id.* pt. III, art. 22, cl. 4-7.

72. See *id.* pt. XVIII, arts. 352-60 (allowing for suspension of rights guaranteed by the Constitution during an emergency); *infra* Part III.B (providing a detailed analysis of the suspension of rights during an emergency).

73. Sripati, *supra* note 14, at 96 (translation: “freedom is my birthright and I shall have it”).

74. See Rapaczynski, *supra* note 17, at 447 n.205 (detailing former colonies’



political thought focused on the idea of constitutionalized fundamental political rights as early as 1928.<sup>75</sup> Thus, when the members of the Constituent Assembly convened to frame Part III of the Constitution, they naturally had before them the United States Bill of Rights. Thus, with respect to the Constitution's human rights provisions, it was the "Potomac and not the Thames that fertilised the flow of Yamuna."<sup>76</sup> The idea of fundamental rights did draw on American origins; in places, the phraseology of the Indian Constitution echoes its American counterpart.<sup>77</sup> Despite this influence, India's particular history shaped the fundamental rights.

The Constitution guarantees a comprehensive array of fundamental rights that are subject to certain explicit exceptions that do not render them illusory. The range of human rights in Part III, Articles 14 through 32, is very wide. Some of these rights are available to both citizens and aliens alike. The following sections briefly describes the major categories of rights as they are commonly clustered and discussed in India.

### *1. Right to Equality*

Articles 14 through 18 deal with the right to equality. Article 14 confers "equality before the law" and "the equal protection of the laws."<sup>78</sup> Article 15 is significant because it prohibits discrimination on the grounds of race, caste, religion, creed, sex, or place of birth.<sup>79</sup>

---

views on enumerating express rights in a bill of rights).

75. See Sorabjee, *supra* note 16, at 94 (noting that the Motilal Nehru Committee's 1928 "Declaration of Fundamental Rights," clearly reflects the influence of the United States Constitution and its Bill of Rights). In response to the Secretary of State for India, Lord Birkenhead's challenge to Indians to come up with a constitution, India's freedom fighters drafted the Motilal Nehru Committee Report of 1928. See *id.*

76. *Shamsher Singh v. State of Punjab*, A.I.R. 1974 S.C. 2192, 2212.

77. Both the United States Constitution and the Indian Constitution guarantee "equal protection of the laws." Compare INDIA CONST. pt. III, art. 14 ("The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India."), with U.S. CONST. amend. XIV, sec. 1 ("No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.")

78. INDIA CONST. pt. III, art. 14, *reprinted in* VII CONSTITUTIONS OF THE COUNTRIES OF THE WORLD, *supra* note 7, at 1, 35.

79. See *id.* art. 15, cl. 1 ("The State shall not discriminate against any citizen on

Also, it sanctions special provisions for women, children,<sup>80</sup> and for the advancement of members of scheduled castes and tribes and socially and educationally backward classes of citizens.<sup>81</sup> Article 16 guarantees equality of opportunity in matters of public employment.<sup>82</sup> Discrimination in matters of public employment in any form—such as religion, sex, caste, and place of birth—is strictly prohibited.<sup>83</sup> In the past, persons at the lower levels of India's caste hierarchy suffered and still suffer from untouchability.<sup>84</sup> Happily, the Indian Con-

the grounds only of religion, race, caste, sex, place of birth or any of them.”).

80. *See id.* art. 15, cl. 3 (“Nothing in this article shall prevent the State from making any special provision for women and children.”).

81. *See id.* art. 15, cl. 4 (“Nothing in this article or in clause (2) of article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward class of citizens for the scheduled castes and the scheduled tribes.”). *See generally* MARK GALANTER, *COMPETING EQUALITIES: LAW AND THE BACKWARD CLASSES OF INDIA* (1984) (discussing the Indian Constitution's attempts to redress centuries of historic repression of India's underprivileged classes by including a constitutional scheme of compensatory discrimination); E.J. Prior, *Constitutional Fairness or Fraud on the Constitution? Compensatory Discrimination in India*, 28 CASE W. RES. J. INT'L L. 63 (1996) (describing India's compensatory discrimination program, an affirmative action attempt to remedy past injustices suffered by those at the lower levels of the hierarchical social order of the Hindu caste system).

82. *See* INDIA CONST. pt. III, art. 16, cl. 1, *reprinted in* VII CONSTITUTIONS OF THE COUNTRIES OF THE WORLD, *supra* note 7, at 1, 48 (“There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State.”).

83. *See id.* art. 16, cl. 2 (“No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of any employment or office under the State.”).

84. *See* GALANTER, *supra* note 81, at 7-17 (discussing the concept of untouchability). Untouchability is a form of caste-based discrimination practiced among Hindus for centuries. *See id.* Mahatma Gandhi called untouchables *Harijans*, meaning children of God, and strove relentlessly to bring them into the fold of Hindu society. *See id.* at 37 (noting Gandhi's hopes for the eradication of the caste system). Dr. B. R. Ambedkar, the Chairman of the Drafting Committee of the Indian Constitution, who himself was born an untouchable, assisted in Gandhi's noble effort. *See id.* at 29 n.34 (describing Ambedkar's origins as a member of the lower caste Mahars). It was at Ambedkar's behest that the special provisions for the advancement of scheduled caste members (harijans) and educationally backward classes of citizens were written into the Constitution. *See id.* at 37, 39 (noting Ambedkar's role as leading architect of the Indian Constitution and its provisions on untouchables).

stitution reflects sensitivity to this problem.<sup>85</sup> In reaction against earlier intolerance, Article 17 specifically abolishes untouchability and outlaws its practice in any form.<sup>86</sup>

### 2. Right to Fundamental Freedoms

Article 19 confers vital freedoms such as “freedom of speech and expression,”<sup>87</sup> freedom to “assemble peacefully and without arms,”<sup>88</sup> to “form associations or unions,”<sup>89</sup> to move freely and to reside and settle in any part of the country,<sup>90</sup> and to practice any profession, occupation, trade or business.<sup>91</sup> These rights are subject to “reasonable restrictions” on specific grounds mentioned in the Constitution.<sup>92</sup>

### 3. Procedural Rights

Impressive procedural rights are provided in Articles 20 through 22 of the Constitution of India, with Article 21 setting the tone: “No person shall be deprived of life or personal liberty except according to procedure established by law.”<sup>93</sup> Article 20 provides certain crucial

85. See INDIA CONST. pt. III, arts. 14-15, *reprinted in VII CONSTITUTIONS OF THE COUNTRIES OF THE WORLD*, *supra* note 7, at 1, 35, 41 (referring to India’s backward classes and “untouchability”).

86. See *id.* art. 17 (stating that “[u]ntouchability’ is abolished and its practice in any form is forbidden . . . [t]he enforcement of any disability arising out of untouchability shall be an offense punishable in accordance with law.”).

87. *Id.* art. 19, cl. 1 (a).

88. *Id.* art. 19, cl. 1 (b).

89. *Id.* art. 19, cl. 1 (c).

90. See *id.* art. 19, cl. 1 (d) (stating that “[a]ll citizens shall have the right to move freely throughout the territory of India”).

91. See INDIA CONST. pt. III, art. 19, cl. 1 (g), *reprinted in VII CONSTITUTIONS OF THE COUNTRIES OF THE WORLD*, *supra* note 7, at 1, 45 (stating that “[a]ll citizens shall have the right to practice any profession, or to carry on any occupation, trade or business”).

92. See *id.* art. 19, cl. 1 (g), (2)-(6) (limiting fundamental freedoms on the basis of state security, foreign relations, public order, decency, and morality).

93. *Id.* art. 21. See also *infra* Part I.C (recounting the story behind the absence of a due process clause in the Indian Constitution). The advice of United States Supreme Court justice Felix Frankfurter to visiting Constituent Assembly member B.N. Rau was influential. See AUSTIN, *supra* note 50, at 103 (describing the Rau-Frankfurter meeting in the United States).

safeguards in respect of conviction for offenses.<sup>94</sup> It guarantees freedom from retroactive crimes,<sup>95</sup> double jeopardy,<sup>96</sup> and self-incrimination.<sup>97</sup> Article 22 concerns access to the courts, counsel, and a public trial.<sup>98</sup> Essentially, this Article provides protection against arrest and detention in certain cases.<sup>99</sup> In case of arrest, a person has the right to know the grounds of arrest, the right to counsel on arrest, and the right to appear before a magistrate within "twenty-four hours" of arrest.<sup>100</sup> The Constitution specifically mandates magisterial supervision in case of imprisonment for a period beyond "twenty-four hours."<sup>101</sup>

#### 4. Right Against Exploitation

Articles 23 and 24 of the Constitution evidence how deeply committed the founding fathers were to creating a humane society in India. Article 23 prohibits traffic in "human beings and begar and other similar forms of forced labor,"<sup>102</sup> while Article 24 prohibits the employment of children in factories, mines, and other hazardous work situations.<sup>103</sup>

---

94. See INDIA CONST. pt. III, art. 20, reprinted in VII CONSTITUTIONS OF THE COUNTRIES OF THE WORLD, *supra* note 7, at 1, 50.

95. See *id.* art. 20, cl. 1 ("No person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence").

96. See *id.* art. 20, cl. 2 ("No person shall be prosecuted and punished for the same offence more than once.").

97. See *id.* art. 20, cl. 3 ("No person shall be compelled to be a witness against himself.").

98. See *id.* pt. III, art. 22 (providing the extensive text of article 22).

99. See *id.* art. 22, cl. 1 (stating that "[n]o person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice.").

100. See INDIA CONST. pt. III, art. 22, cl. 1, reprinted in VII CONSTITUTIONS OF THE COUNTRIES OF THE WORLD, *supra* note 7, at 1, 58.

101. *Id.* art. 22, cl. 2.

102. *Id.* art. 23.

103. See *id.* art. 24 (stating that "[n]o child below the age of fourteen years shall be employed to work in any factory or mine or engaged in any hazardous employment").

### 5. Right to Freedom of Religion

Various facets of religious freedom rights are delineated in Articles 25 through 28 of the Constitution. Article 25 guarantees to all persons freedom of conscience and the right freely to profess, practice, and propagate their religion.<sup>104</sup> Interestingly, the State is vested with far reaching powers to regulate this freedom not merely in its secular aspects—in the interests of public order and morality<sup>105</sup>—but also to effect social reform and compel public Hindu temples to open their doors to all classes of Hindus.<sup>106</sup> Public order, morality, and health are the only explicit restrictions on this right.<sup>107</sup> Freedom to manage religious affairs, which includes establishing and maintaining institutions for religious and charitable purposes, is also guaranteed to every religious denomination in the country.<sup>108</sup> Article 27 prohibits compelling any person to pay taxes for the promotion or maintenance of a particular religion or denomination.<sup>109</sup> This Article embodies some principles underlying the establishment clause in the United States Constitution.<sup>110</sup> Religious instruction in educational institutions wholly maintained by state funds is also constitutionally prohibited in India.<sup>111</sup>

---

104. See *id.* art. 25 (“Subject to public order, morality and health and to other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practice, and propagate religion.”).

105. See *id.* art. 25, cl. 2 (a) (“Nothing in this article shall effect the operation of any existing law or prevent the State from making any law regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice.”).

106. See INDIA CONST. pt. III, art. 25, cl. 2 (b), *reprinted in* VII CONSTITUTIONS OF THE COUNTRIES OF THE WORLD, *supra* note 7, at 1, 61 (“Nothing in this article shall affect the operation of any existing law or prevent the state from making any law providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus.”).

107. See *id.* art. 25, cl. 1.

108. See *id.* art. 26, cl. 1 (a)–(d) (“Subject to public order, morality and health, every religious denomination or any section thereof shall the right . . .”).

109. See *id.* art. 27 (“No person shall be compelled to pay any taxes the proceeds of which are specifically appropriated in payment of the expenses for the promotion or maintenance of any particular religion or religious group.”).

110. See U.S. CONST. amend. I.

111. See INDIA CONST. pt. III, art. 28, cl. 1, *reprinted in* VII CONSTITUTIONS OF THE COUNTRIES OF THE WORLD, *supra* note 7, at 1, 65.

### 6. Cultural and Educational Rights

India is a multi-ethnic and multi-religious nation reflecting a rich diversity of castes, religions, languages, and cultures. In establishing a secular state founded on the principle of equality, the founding fathers were guided by the principle of enlightened accommodation of diverse faiths and religions. Accordingly, the Constitution contained special provisions protecting the interests of minorities. Any distinct religious, cultural, and linguistic group enjoys the right to freely establish and administer institutions to preserve their culture, language, and script.<sup>112</sup> Where such institutions receive grants from the state, they must comply with the constitutional ban on certain kinds of discrimination in their admission policies.<sup>113</sup>

### 7. Right to Property

Originally the Constitution guaranteed the right to property.<sup>114</sup> This right, however, was deleted from the list of fundamental rights by the 44<sup>th</sup> Constitutional Amendment Act of 1978, in April 1979.<sup>115</sup>

### 8. Right to Constitutional Remedies

All the above rights would be otiose in the absence of a right to move the court for their enforcement. Happily, the Constitution guarantees this crucial right in Article 32.<sup>116</sup> Any person—citizen and alien alike—has the right to invoke the highest court's jurisdiction

---

112. See *id.* art. 29, cl. 1 (stating that “[a]ny section of the citizens residing in the territory or any part thereof having a distinct language, script, or culture of its own shall have the right to conserve the same.”).

113. See *id.* art. 30 (providing the “right of minorities to establish and administer educational institutions”).

114. See *id.* art. 31 (stating that Parliament repealed the “[c]ompulsory acquisition of property” provision in 1978); see also AUSTIN, *supra* note 50, at 89 (discussing the property provisions in the draft constitution).

115. See AUSTIN, *supra* note 50, at 89; see also *infra* notes 152-56 and accompanying text (discussing the litigation and intense Parliament-Judiciary controversy involving property rights, and the subsequent constitutional amendments that deleted these rights from the list of fundamental rights).

116. See INDIA CONST. pt. III, art. 32, reprinted in VII CONSTITUTIONS OF THE COUNTRIES OF THE WORLD, *supra* note 7, at 1, 71.

for the vindication of his or her constitutional rights.<sup>117</sup> These human rights provisions were written into the Constitution “with the hope that one day the tree of true liberty would bloom in India.”<sup>118</sup>

### C. THE STORY OF THE DUE PROCESS CLAUSE

Despite the tremendous influence of the United States Bill of Rights in framing the Indian Constitution's Part III provisions, the absence of a due process clause is conspicuous. Why is this so? Ironically, it was the advice of an American jurist, Felix Frankfurter, that contributed to the demise of this clause in the Constitution.<sup>119</sup> Under the inspiration of the United States Constitution, the framers of the Indian Constitution included a due process clause modeled on the Fifth Amendment to the United States Constitution when they set out to draft Part III. Proposed Article 15 of the draft constitution read as follows: “No person shall be deprived of life, liberty or property without due process of law.”<sup>120</sup> Given the feudalistic nature of Indian society during British rule, however, many members were principally concerned with how the land and land rights of the few could be placed at the disposition of the many for the sake of social justice.<sup>121</sup> Specifically, they feared that the guarantee of due process—the requirement to prove that property sought to be expropriated was meant for specific public use and the requirement of just compensation—in the hands of a conservative judiciary would turn the protection of property rights into an obstacle to the vigorous pursuit of social justice in independent India.<sup>122</sup> The particular experience of the United States Supreme Court with substantive due process in the

117. See *id.* (providing the right to petition the Indian Supreme Court for enforcement of fundamental rights).

118. AUSTIN, *supra* note 50, at 108.

119. See *id.* at 103 (discussing the meeting of B.N. Rau and Felix Frankfurter during Rau's 1947 visit to the United States).

120. See *id.* at 84-85 (providing the text of Article 15 of the draft constitution and describing India's Constituent Assembly's initial treatment of the scope of due process rights).

121. See *id.* at 101 (discussing the principle factors against the incorporation of a due process clause in India).

122. See *id.* at 87, 99 (articulating the fears of various assembly members about possible future conflicts between individual property rights and collective societal rights).

early part of the century<sup>123</sup> and its invalidation of beneficial socio-economic legislation gave rise to fears among India's constitutional committee members.<sup>124</sup> For instance, B.N. Rau, the Constitutional Advisor to the Assembly, warned members that the "[c]ourts manned by an irremovable judiciary not so sensitive to public needs in the social or economic sphere as the representatives of a periodically elected legislature, will, in effect, have a veto on legislation exercisable at any time and at the instance of any litigant."<sup>125</sup> Other members voiced similar concerns.<sup>126</sup>

It is no surprise that when the Constituent Assembly members began discussing life and liberty under proposed Article 15, one doubt persistently hovered over the assembly hall: Must property then be grouped with the right to life and liberty? Must property be protected by due process?<sup>127</sup> Subsequently, Rau left on a trip to the United States, where he sought the advice of eminent constitutional law professors and jurists in framing India's Constitution. Justice Frankfurter drew Rau's attention to the United States Supreme Court's substantive interpretations of due process that resulted in the striking down of beneficial socio-economic legislation.<sup>128</sup> How materially that brief occasion with Frankfurter had affected Rau's understanding of the dangers inherent in the substantive interpretations that could be placed on the due process clause is clear in Rau's advice to his colleagues on his return from the United States. He urged his colleagues to drop the due process clause with regard to the property provision in the draft constitution.<sup>129</sup> It is worth noting that Rau was concerned

---

123. See *id.* at 87 (discussing United States Supreme Court decisions of the early part of the century).

124. See AUSTIN, *supra* note 50, at 87 & n. 12 (noting the invalidation of wages and hours legislation in the United States by the Supreme Court on due process grounds).

125. *Id.* at 87.

126. See *id.* at 88 (describing the debate between Assembly members Ambedkar, Patel, and Paut).

127. See *id.* at 94 (detailing Assembly Members' specific procedural due process concerns).

128. See *id.* at 87 & n.12 (discussing Frankfurter's suggestions to Rau).

129. See AUSTIN, *supra* note 50, at 103.



only with excluding substantive due process, but not denying procedural safeguards.<sup>130</sup>

With the elimination of the word “property” from Article 15 of the draft constitution, the due process safeguard now extended only to the right to life and liberty.<sup>131</sup> This formulation also attracted opposition. Alladi K. Aiyer, an influential Assembly member, pleaded vehemently in favor of dropping the due process protection even with regard to life and liberty.<sup>132</sup> He warned the members that the due process clause would obstruct the adoption of preventive detention laws. Although he viewed preventive detention laws as harsh measures, he believed that they were the only panacea that could save the infant nation from being engulfed by communal riots and social unrest.<sup>133</sup> Gandhi’s brutal assassination by a Hindu fundamentalist in 1948 nourished serious concerns among the members about the possible excesses of anti-social elements, which furthered Aiyer’s argument.<sup>134</sup> Finally, the committee concluded that it was worth placing citizens’ freedom within the legislature’s power for the sake of creating a peaceful environment in which social and economic reforms could be achieved.<sup>135</sup> They dropped the substantive due process protection altogether and revised Article 15 of the draft constitution to read as follows: “No person shall be deprived of life or personal liberty except according to procedure established by law.”<sup>136</sup>

#### D. THE RETURN OF DUE PROCESS—INFUSION OF ITS SUBSTANCE INTO THE CONSTITUTION

Can a constitution that “secures liberties by providing for judicial review of executive and legislative action on the basis of court-

130. *See id.* at 98-99.

131. *See id.* at 101-12 (discussing the history of due process and liberty in India’s draft constitution).

132. *See id.* at 104 (illustrating the conflict between individual rights and the States’ general police duties).

133. *See id.*

134. *See id.*

135. *See* AUSTIN, *supra* note 50, at 104 (discussing the Constituent Assembly’s final determination with respect to due process).

136. TRIPATHI, *supra* note 42, at 85 (noting that the phrase “procedure established by law” was borrowed from the Japanese Constitution).

policed standards of reasonableness simply succeed in avoiding the doctrine of 'due process' and 'police powers'?"<sup>137</sup> Certainly not, as the Constituent Assembly debates and a closer reading of the fundamental rights provisions demonstrate.<sup>138</sup>

Many lovers of liberty criticized the revised Article 15 of the draft constitution when it was submitted to the Constituent Assembly.<sup>139</sup> As it stood, this Article seemed to safeguard the irreducible claims of life and liberty only by a mere "procedure established by law."<sup>140</sup> There was no mention of the specific type of procedure required to deprive a citizen of his life and liberty<sup>141</sup> and no guarantee of a fair trial with aid of counsel in a court of law. Finally, the Chairman of the Drafting Committee decided to insert a new article into the draft constitution, which corresponds to Article 22 of India's Constitution—the right to a fair trial.<sup>142</sup>

137. *Id.* at 90; *see also supra* notes 87-92 and accompanying text (discussing the "reasonable restriction" provision of Article 19 of the Indian Constitution).

138. *See* TRIPATHI, *supra* note 42, at 90-94 (describing police powers, due process, article 19, and United States precedents); *see also* INDIA CONST. pt. III, arts. 19-22, *reprinted in* VII CONSTITUTIONS OF THE COUNTRIES OF THE WORLD, *supra* note 7, at 1, 45-59 (enumerating fundamental rights).

139. *See* AUSTIN, *supra* note 50, at 105 (noting, further, the popularity of Article 15 with due process supporters).

140. INDIA CONST. pt. III, art. 21, *reprinted in* VII CONSTITUTIONS OF THE COUNTRIES OF THE WORLD, *supra* note 7, at 1, 51.

141. *See* TRIPATHI, *supra* note 42, at 89 (describing the deficiencies of the amendment).

142. Referring to the apprehensions expressed by the Constituent Assembly members on the removal of "due process," from Article 15 of the draft constitution, Dr. B.R. Ambedkar observed: "We are therefore, now, by introducing Article 15A, (Article 22 of the Constitution) making, if I may say so, compensation for what was done then in passing Article 15. In other words, we are providing for the substance of the law of "due process" by the introduction of Article 15A." *Id.* (citing IX Constituent Assembly Debates 1497).

At the end of the debate on the inclusion of Article 15A, Dr. Ambedkar again stated:

Ever since that article (Article 15) was adopted, I and my friends had been trying in some way to restore the content of due procedure with its fundamentals without using the words "due process." I should have thought that the members who are interested in the liberty of the individual would be more than satisfied for being able to have the prospect before them of the provisions contained in Article 15A.

*Id.*

Furthermore, Article 19, one of the Constitution's fundamental rights provisions, guarantees many crucial freedoms such as freedom of speech and freedom of assembly.<sup>143</sup> Significantly, Clauses 2 through 6 of the same Article articulate the specific grounds on which "reasonable restrictions" can be placed by the legislature to curb these freedoms.<sup>144</sup> Who has the authority to determine the "reasonableness" of these restrictions and the validity of the law? It is none other than the Judiciary.<sup>145</sup> Therefore, "reasonableness" is "substantive due process," and these provisions, in effect, provide important due process protections. This logic applies to Articles 20 and 22 as well. In essence, those Articles define the contours of individual rights protected by due process and the corresponding power of the State.<sup>146</sup>

Thus, the founding fathers remarkably planted the seeds embodying the "substance" of due process within the Constitution. It is a

---

143. See *supra* notes 87-92 and accompanying text (describing the provisions of Article 19).

144. See TRIPATHI, *supra* note 42, at 85 (discussing the grounds for "reasonable restrictions" on Article 19's provisions). Article 13 of the draft constitution corresponds to Article 19, Clauses 2 through 6 of the Constitution. See TRIPATHI, *supra* note 42, at 85 (noting that initially, the restrictions permitted on the seven freedoms in Article 13 were not justiciable). One of the members of the assembly had, however, made a prescient suggestion. See *id.* at 86-87 (recounting the criticism and suggestion of Pt. Thakur Das Bhargava). He said:

Sir, one speaker was asking where the soul in the lifeless article 13 was? I am putting the soul there. If you put the word "reasonable" there, the Court will have to say whether a particular act is in the interests of the public and, secondly, whether the restrictions imposed by the legislature are reasonable, proper and necessary in the circumstances of the case. The courts will have to go into the question and it will not be the legislature and the executive who could play with the fundamental rights of the people. It is the courts who will have the final say. Therefore, my submission is that we must put in these words "reasonable," or "proper" or "necessary" or whatever good word the House likes. I understand that Dr. Ambedkar is agreeable to the word "reasonable." Otherwise, Article 13 is a nullity. It is not fully justiciable now and the courts will not be able to say whether the restrictions are necessary or reasonable.

*Id.*

145. See TRIPATHI, *supra* note 42, at 90 (describing due process as a judicial test of "reasonableness").

146. See *supra* notes 93-101 and accompanying text (describing the provisions of Articles 20 and 22 of the Indian Constitution).

great pity, however, that these seeds did not begin to sprout until twenty-eight years after the commencement of the Constitution.

## II. JUDICIAL PROTECTION OF FUNDAMENTAL RIGHTS

The content of Part III of the Indian Constitution has changed since 1950 when the Constitution came into force; however, the rights have grown neither swiftly nor steadily. The Supreme Court and its exercise of judicial review since its inception in 1950 are important parts of the story of human rights in India.<sup>147</sup> The bold introduction of the power of judicial review in an under-developed Asian nation such as India was indeed beneficial.<sup>148</sup> The exercise of this power by the Supreme Court, however, was not without problems.

During the first year of its inception, the Court leveled a death-blow to personal liberty, ignoring the procedural protections contemplated by and crystallized in the Constitution through judicial review. Adopting an uncomfortably restricted view of "personal liberty," the Court ruled that a procedure duly enacted by the legislature was sufficient to deprive a citizen of his liberty.<sup>149</sup> Significantly, the procedure did not have to conform to the principles of natural justice, and it did not have to fulfill the tests of other fundamental rights.<sup>150</sup>

Generally, the discourse on constitutionalism in the early years revolved around the issues pertaining to land reform legislation and grievances of the landed gentry. Not surprisingly, the right to property was the most litigated constitutional provision and the subject of numerous constitutional amendments.<sup>151</sup> Unfortunately, during the

147. See generally GOBIND DAS, *THE SUPREME COURT IN QUEST OF IDENTITY* (1986); UPENDRA BAXI, *THE INDIAN SUPREME COURT AND POLITICS* (1983); UPENDRA BAXI, *COURAGE, CRAFT AND CONTENTION: THE SUPREME COURT OF THE EIGHTIES 1-64* (1986) [*hereinafter* BAXI, *COURAGE, CRAFT AND CONTENTION*] (discussing the Supreme Court of India during the 1980s).

148. See TRIPATHI, *supra* note 42, at 68 (stating that "[b]y and large it engendered a sense of security and respect for the law and for the law courts throughout the country, so vital to a good beginning for a young democracy").

149. See *A.K. Gopalan v. State of Madras*, A.I.R. 1950 S.C. 27.

150. See *id.* at 33-37.

151. See Sripati, *supra* note 14, at 106 n.96 (providing a thorough history of land related constitutional amendments in India).

early period of constitutionalism in India, the Court aligned itself with the propertied classes and was perceived as an exclusive domain for the rich and wealthy. Adorned with judges wedded to the traditional concepts of property rights and dated creeds, the Supreme Court struck down both the agrarian reforms drastically needed to usher in an egalitarian society and the legislation dealing with the nationalization of banks.<sup>152</sup> Furthermore, the Court reduced compensation for acquisition of lands and refused to abolish the privy purses of princes.<sup>153</sup> In other words, the government attempted to continue its advancement of property rights to all citizens through its power to amend the Constitution, while the Court blocked its initiatives, holding that Parliament did not have such an absolute power to amend the Constitution. Ultimately, the historic case of *Kesavananda Bharathi Sripadagalavaru v. State of Kerela*<sup>154</sup> resolved this vitriolic Parliament-Judiciary controversy. The Court held that Parliament could amend the Constitution, so long as it did not destroy the Constitution's "basic features."<sup>155</sup>

Subsequently, the Court upheld Prime Minister Indira Gandhi's declaration of Emergency<sup>156</sup>—the gravest constitutional crisis in the nascent Republic's life—acquiescing in the subversion of the Constitution and flagrant violations of civil liberties by the Executive.<sup>157</sup>

---

152. See *R.C. Cooper v. Union of India*, A.I.R. 1970 S.C. 564 (providing the text of what is popularly known as the Bank Nationalisation Case).

153. See *Madhav Rao Scindia v. Union of India*, A.I.R. 1971 S.C. 530 (providing the text of what is popularly known as the Privy Purses Case); *I.C. Golaknath v. State of Punjab*, A.I.R. 1967 S.C. 1643 (denying Parliament the power to amend any of the Constitution's fundamental rights).

154. A.I.R. 1973 S.C.C. 1461.

155. *Id.*; see also Sripati, *supra* note 14, at 106 n.96 (discussing *Kesavananda Bharathi Sripadagalavaru v. State of Kerela*). The nonamendable parts or the "basic features" of the Constitution are "principle of equality," "freedom and dignity of the individual," secularism, rule of law, judicial review, the "essence" of other fundamental rights, and other features. See DURGA DAS BASU, CONSTITUTIONAL LAW OF INDIA 376-77 (3d. ed. 1983).

156. See *Additional District Magistrate v. Shivkant Shukla*, A.I.R. 1976 S.C. 1207 (affirming Indira Gandhi's declaration of Emergency).

157. India was under Emergency Rule from June 1975 to March 1977 because the late Indira Gandhi, who was then Prime Minister, declared an Emergency, ostensibly to safeguard the country's integrity and security from "internal disturbances;" however, in reality, the declaration was for purely personal and partisan

Despite the Court's prior attempts to place a check on Parliament's unbridled power, the opening two and a half decades of the Republic were the worst periods for constitutional development in India.<sup>158</sup> Indeed, neither of the two important institutions of governance—the Parliament and the Judiciary—made any enduring contributions toward strengthening constitutionalism in the country.

The Emergency period was actually India's second freedom struggle. It was a seminal experience that spurred societal institutions to play a crusading role in safeguarding citizens' liberties from executive excesses. The catalytic influence of the Emergency period seems to have contributed to the metamorphosis of the Supreme Court. Abandoning its hitherto deferential attitude toward the executive, the Court adopted the role of a "social auditor."<sup>159</sup> In its new role, the Court recognized the rights of the poor and downtrodden people of India and expanded its reach to cover their interests.<sup>160</sup> Thus, after

---

political ends. See Ved. P. Nanda, *From Gandhi to Gandhi: International Legal Responses to the Destruction of Human Rights and Fundamental Freedoms in India*, 6 DENV. J. INT'L L. & POL'Y 1, 36 (1976) (opining that "constitutional repudiation of a Prime Minister or a political party in power most certainly does not comprise such a threat "to the life of the nation as required by the international community").

158. See, e.g., *Indira Gandhi v. Raj Narain*, A.I.R. 1975 S.C. 2299 (holding Clause 4 of the Constitutional (Thirty-ninth) Amendment Act, 1975 unconstitutional). In June 1975 the Allahabad High Court held the late Mrs. Indira Gandhi guilty of corrupt electoral practices. See *id.* Mrs. Gandhi appealed as did the respondent, Mr. Raj Narain, who filed a cross appeal before the Supreme Court challenging the findings of the Allahabad High Court, which found Mrs. Gandhi not guilty on only two counts. See *id.* While Mrs. Gandhi's appeal and the respondent Raj Narain's appeals were pending with the Supreme Court, the Congress party enacted the Constitutional (Thirty-Ninth) Amendment Act, 1975 to the Constitution. See *id.* This amendment did three things: 1) It made the Prime Minister's election unassailable in a Court of law; 2) It deprived the defeated candidate of the right to dispute the validity of the election by not providing another forum of appeal; 3) In effect it directed the Supreme Court to allow Mrs. Gandhi's appeal and dismiss Raj Narain's cross appeal. See *id.* The Supreme Court struck down this amendment holding that it violated the "democratic set-up" and the "rule of law" that are essential features of the constitution. See *id.*

159. *Fertilizer Corp. Kamgar Union v. Union of India*, A.I.R. 1981 S.C. 344, 353 (commenting, however, that "[t]he court cannot usurp or abdicate, and the parameters of judicial review must be clearly defined and never exceeded").

160. See Upendra Baxi, *Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India*, in *THE ROLE OF THE JUDICIARY IN PLURAL SOCIETIES* 32, 32-33 (Neelan Tiruchelvan & Radhika Coomaraswamy eds. 1987) (discussing

twenty-seven years of the Republic, "the Supreme Court of India became a Supreme Court for all Indians."<sup>161</sup>

#### A. EXPANDING CONTENT OF FUNDAMENTAL RIGHTS

The Supreme Court gloriously expanded the right to life and personal liberty to include the right to travel abroad in *Maneka Gandhi v. Union of India*—its historic post-Emergency decision.<sup>162</sup> The Court articulated that Part III of the Constitution was designed to create conditions in which every human could develop his personality to the fullest extent.<sup>163</sup> Even more notably, the judges declared that any procedure that curtails life and liberty must be right, just, fair, and infused with the principles of natural justice.<sup>164</sup> Procedure cannot be arbitrary, fanciful, and oppressive.<sup>165</sup> Procedural due process, which was crystallized in the Constitution and received a deathblow in *Gopalan*, was finally resurrected twenty-eight years after the commencement of the Constitution.

The Court's historic ruling in *Maneka Gandhi* resulted in remarkable developments in the protection of life and liberty, even for individuals accused of crimes and individuals confined behind iron walls. The sensitized Judiciary declared that life, even life behind prison bars, did not mean mere animal existence.<sup>166</sup> Ergo, death row prisoners are entitled to food, clothing, and shelter on par with other ordinary prisoners. Inmates are considered to be in the "safekeeping" of prison authorities and cannot be subjected to mental or physical

---

the Court's recognition of the rights of the poor in India).

161. *Id.* at 31 (providing the Court's logic of enlarging locus standi or *Ubi jus ibi remedium* so as to promote justice and embrace all interests of public minded citizens).

162. A.I.R. 1978 S.C. 597.

163. *See id.* at 620 (noting that these rights are comprehensive, falling under four categories, namely, the rights to equality, freedom against exploitation, freedom of religion, cultural and educational rights).

164. *See id.* at 619-23 (noting that Article 21 provides that "[n]o person shall be deprived of his life or personal liberty except according to procedure established by law").

165. *See id.* at 624.

166. *See Sunil Batra v. Delhi Admin.*, A.I.R. 1978 S.C. 1675 (continuing the expansion of personal fundamental rights).

torture.<sup>167</sup> Torture, cruelty, arbitrary imposition of solitary confinement,<sup>168</sup> use of iron chains,<sup>169</sup> routine handcuffing of prisoners,<sup>170</sup> denial of permission to prison inmates to have interviews with their attorneys and family members,<sup>171</sup> and other inhumane practices<sup>172</sup> can no longer pass the constitutional gauntlet masked as punitive practices pursuant to the rule of fair procedure established in *Maneka Gandhi*. The following passage perhaps best sums up the great strides the Court had made in weaving procedural due process into the constitutional tapestry:

True, our Constitution has no due process clause or the VIII amendment. But after *Maneka Gandhi*, the consequence is the same. For what is punitively outrageous, scandalizingly unusual or cruel, rehabilitatively counter productive is unarguably unreasonable or arbitrary. Part III of the Constitution does not part company with the prisoner at the gates. Judicial oversight protects the prisoners' shrunken fundamental rights if frowned, frozen or flouted on by the prison authorities.<sup>173</sup>

Additionally, as a result of *Maneka Gandhi*, Article 21 mandates a speedy trial for the accused.<sup>174</sup> In fact, any procedure that does not ensure a reasonably expeditious trial can never be regarded as reasonable, fair, or just.<sup>175</sup> Consequently, the Supreme Court held incar-

---

167. *See id.* at 1586.

168. *See id.* at 1587 (listing practices that are no longer acceptable for prisoners).

169. *See Charles Sobraj v. Delhi Admin.*, A.I.R. 1978 S.C. 1590 (expanding prisoners' fundamental rights and conditions).

170. *See Prem Shanker Shukla v. Delhi Admin.*, A.I.R. 1980 S.C. 1535 (adjudging that preventing a prisoner from escaping custody or becoming violent are the only two valid justifications for chaining prisoners).

171. *See Francis Coralie Mullin v. W.C. Khambra*, A.I.R. 1980 S.C. 849 (noting that the detaining authority must provide the inmate with a "very early opportunity to make an effective representation").

172. *See Sunil Batra v. Delhi Admin.*, A.I.R. 1980 S.C. 1565, 1579 (noting that this case "imparts to the habeas corpus writ a versatile vitality and operational utility that makes the healing presence of the law live up to its reputation as a bastion of liberty even within the secrecy of the hidden cell").

173. *Id.* at 1586.

174. *See id.* at 1594 (directing strict compliance with the norms of Article 21).

175. *See Hussainara Khatoon v. State of Bihar*, A.I.R. 1979 S.C. 1360; *Kadra Pahadiya v. State of Bihar*, A.I.R. 1982 S.C. 1167.



ceration of pre-trial prisoners languishing in prison for patently long periods prior to trial unconstitutional and violative of Article 21.<sup>176</sup> Galvanized by "Gideon's trumpet that was heard across the Atlantic,"<sup>177</sup> the Court also declared free legal services, another ingredient of fair procedure under Article 21, a "processual piece of criminal justice."<sup>178</sup> The right to free legal services was not the last right to be articulated. Many more rights followed.

For example, the Court applied Article 21's emphasis on procedural fairness to prohibit the incarceration of a judgment debtor, who could not afford to pay his debts, so as to decree payment.<sup>179</sup> Additionally, in *Rudul Shah v. State of Bihar*,<sup>180</sup> a trailblazing decision in 1983, the Supreme Court recognized and punished the lawless behavior of state officials. The Court emphatically declared that Article 21 could not be meaningfully safeguarded unless the Court "mulct[ed] its violators in the payment of monetary compensation."<sup>181</sup> In *Rudul Shah*, the Court awarded compensation to the petitioner for the loss of his limbs during his traumatic police custody.<sup>182</sup> In 1993 the Court reiterated that the right to receive compensation for the unlawful deprivation of Article 21 was a fundamental right of every citizen<sup>183</sup> and articulated the underlying principle of this right as follows:

It may be mentioned straightaway that award of compensation in a proceeding under Art. 32 by this Court or by the High Court under Art. 226 of the Constitution is a remedy available in public law, based on strict liability for contravention of fundamental rights to which the principle of sovereign immunity does not apply, even though it may be available as a defense in private law in an action based on tort.<sup>184</sup>

---

176. See *Hussainara Khatoon*, A.I.R. 1979 S.C. 1360.

177. *M.H. Hoskot v. State of Maharashtra*, A.I.R. 1978 S.C. 1549, 1554.

178. *Id.* at 1549 (ruling that free legal services was a fundamental right).

179. See *Jolly George Varghese v. Bank of Cochin*, A.I.R. 1980 S.C. 475.

180. A.I.R. 1983 S.C. 1086.

181. *Id.* at 1089.

182. See *id.* (noting the "theaters of torture" created by state officials in India).

183. See *Nilabeti Behera v. State of Orissa*, A.I.R. 1993 S.C. 1960.

184. *Id.* at 1966.

Most of the Court's newly articulated rights were civil and political in nature. However, the combination of judicial review and the influence of Directive Principles also brought visible and enduring results in the realm of socio-economic and environmental justice.

In *Olga Tellis v. Bombay Municipal Corporation*,<sup>185</sup> the Court gave a new socio-economic dimension to Article 21. Here, the Court addressed the eviction of pavement dwellers by the Bombay Municipal Corporation.<sup>186</sup> The petitioners argued that the pavements served as their home-cum-workplace and that eviction from the public lands would mean a loss of their means of livelihood and life itself.<sup>187</sup> Interestingly, the Court responded to their pitiable plight by halting all evictions and demolitions for a period of four years following the filing of a writ of petition.<sup>188</sup> The Court reasoned that although the State could not be compelled to provide work to all its citizens, depriving a person of his means of livelihood was tantamount to depriving him of his right to life.<sup>189</sup> The Court stated: "Any person, who is deprived of his right to livelihood except according to just and fair procedure established by law, can challenge the deprivation as offending the right to life conferred by Art. 21."<sup>190</sup> Based on this recently revealed socio-economic aspect of Article 21, the Court passed interim orders in other cases where the government's decisions proved potentially harmful to poor citizens' life styles and welfare.<sup>191</sup>

Beginning from the early 1980s, the Court also began to green Indian Constitutional law to safeguard the citizens' health from the deleterious consequences of environmental degradation. The Court relied on the Constitution's Part IV Directive Principle, which mandates the State to protect and improve the environment and safeguard

---

185. A.I.R. 1986 S.C. 180.

186. *See id.* at 193.

187. *See id.* at 194.

188. *See id.*

189. *See id.* at 194.

190. *Id.*

191. *See, e.g., Karjan Jalasay Y.A.S.A.S. Samiti v. State of Gujarat*, A.I.R. 1987 S.C. 532 (checking government's decisions on environmental issues).

the country's forests and wildlife,<sup>192</sup> and prior case law that expanded the definition of "life" under Article 21 to recognize pollution and environmental degradation as violative of the spirit of Article 21.<sup>191</sup>

*Rural Litigation and Entitlement Kendra v. State of Uttar Pradesh*<sup>194</sup> ushered in this trend. In *Kendra*, the Court ordered the closure of certain limestone quarries in the Himalayan range of Mussoorie Hill on the grounds that their operations were upsetting India's ecological balance and harming the environment.<sup>195</sup> Although the Court did not explicitly refer to Article 21 in its judgment, it is clear that the Court entertained the environmental complaints under Article 32—guided by Article 48A, the aforementioned Part IV Directive Principle<sup>196</sup>—as involving a violation of Article 21's right to life.

Ten years later, the Court clearly established this link between environmental degradation and Indian citizens' fundamental right to life by holding:

Article 21 protects the right to life as a fundamental right. Enjoyment of life and its attainment including the right to live with human dignity encompasses within its ambit, the protection and preservation of the environment, ecological balance, free from pollution of air and water sanitation without which life cannot be enjoyed. Any actions that would cause environmental pollution, ecological, air or water pollution, etc. should be regarded as amounting to violation of Article 21.<sup>197</sup>

In a more recent decision, the Court incorporated the "polluter pays" principle into Indian constitutional law.<sup>198</sup> Specifically, the

192. See INDIA CONST. pt. IV, art. 48A, reprinted in VII CONSTITUTIONS OF THE COUNTRIES OF THE WORLD, *supra* note 7, at 1, 79 (concerning "protection and improvement of environment and safeguarding of forests and wild life").

193. See *supra* notes 162-65 and accompanying text (discussing how the Supreme Court of India declared that life in Article 21 did not mean mere animal existence).

194. A.I.R. 1985 S.C. 652.

195. See *id.*

196. See *supra* note 192 (providing the text of Article 48A of India's Constitution).

197. *Virendra Gaur v. State of Haryana*, A.I.R. 1995 S.C. 577.

198. See D. Shanmuganathan & L.M. Warren, *Status of Sustainable Development as a Principle of National and International Law: The Indian Approach*, 9 J. OF ENVTL. L. 387, 397-402 (1997) (discussing the case of *Indian Council for Envi-*

Court found chemical companies liable for environmental pollution caused by toxic sludge, and held that they must pay a sum determined by the federal government for remedial measures.<sup>199</sup>

The above environmental decisions have far reaching significance. By raising environmental matters to the level of constitutional issues, the Court enabled citizens to invoke its writ jurisdiction. In other words, the Court provided citizens a speedy and inexpensive tool to take action against industries that often exploit and harm them and rarely consult them on matters of significant importance.

### B. SCOPE OF THE FUNDAMENTAL RIGHTS

A striking feature of the Indian Constitution is that many of the human rights provisions in Part III are couched in universal terms—they are not addressed merely to the State.<sup>200</sup> Nevertheless, one cannot avoid wondering whether non-state actors are completely amenable to the Court's remedial judicial review?

Thus, in a series of cases the Court developed creative juristic ways to draw private actors "into the tent of state action"<sup>201</sup> to discipline exploitative relations between groups, institutions, and men and women in Indian civil society. In *People's Union for Democratic Rights v. Union of India*,<sup>202</sup> a case concerning the existence of bonded labor, the Court found private contractors employed by the Delhi Administration liable for the non-payment of minimum wages to migrant laborers.<sup>203</sup> Fortunately, in another case involving a private fertilizer plant's emission of noxious gases hazardous to both workers'

---

*ronmental Legal Action v. Union of India*).

199. *See id.*

200. The following Articles in Part III of the Indian Constitution are all stated in general terms and have not been addressed merely to the State: Article 17 dealing with untouchability, Article 19 dealing with Fundamental Freedoms, Article 21 dealing with due process, Articles 23-24 dealing with exploitation, Articles 25, 26, 29 and 30 dealing with religious and cultural rights. These rights can therefore be claimed against anybody without establishing a connection with the State.

201. *Sukhdev Singh v. Bhagatram*, A.I.R. 1975 S.C. 1331, 1355 (citing Arthur S. Miller, *The Constitutional Law of the "Security State,"* 10 STAN. L. REV. 620, 664 (1958)).

202. A.I.R. 1982 S.C. 1473.

203. *See id.*; *see also* *Bandhua Mukti Morcha v. Union of India*, A.I.R. 1984 S.C. 802 (protecting workers rights).

health and the environment, the Court did not balk from holding the privately owned company liable for failing to discharge its statutory obligations.<sup>204</sup> More recently, in *Mohini Jain v. State of Karnataka*,<sup>205</sup> the Court held a private educational institution amenable to the discipline of Part III of India's Constitution. Reading Article 41—a Directive Principle—into the fundamental rights chapter, the Court articulated yet another socio-economic right—the right to education.<sup>206</sup> Basically, the Court adjudged that no citizen could lead a life of dignity inherent in Article 21 unless he or she is educated.<sup>207</sup> The State discharges its constitutional duty to provide education to its citizens through private educational institutions.<sup>208</sup> Therefore, in *Mohini Jain*, where Indian private schools charged exorbitant tuition and kept educational courses beyond the reach of the common man, the Court held that the schools were acting in a manner repugnant to the Constitution.<sup>209</sup> Moreover, it is only when the Court marches along the road to social justice with the banner of democracy and the rule of law, as illustrated above, that Part III of the Constitution becomes a living reality for Indians.

There is a considerable amount of additional case law that contributes to India's constitutional jurisprudence. Indeed, the thousands of cases Indian courts decide daily testify to the steady realization of constitutional values, including, but not limited to, religious liberty, equality, affirmative action, and freedom of the press.

### C. ANALYSIS

What can one learn from comparing the Supreme Court's ruling in *Gopalan* with its decisions in the post-Emergency era? The lesson, in short, is that it is not enough to have a constitution that guarantees an impressive array of fundamental rights. Ultimately it is the judiciary that pours meaning into the letter of the law or constrains the breadth

---

204. See *M.C. Mehta v. Union of India*, A.I.R. 1987 S.C. 965 (also known as *Sri Ram Fertilizer Gas Leak Case*).

205. A.I.R. 1992 S.C. 1858.

206. See *id.*

207. See *id.*

208. See *id.* at 1863-64, 1870-71.

209. See *id.*

of its reach. Although the founding fathers infused the substance of procedural due process within the Constitution, it remained a chimaera for twenty-eight years only because of judicial myopia.

If *Gopalan* represents the dramatic demise of procedural fairness at the hands of the judiciary, then *Maneka Gandhi* and its progeny<sup>210</sup> demonstrate the Court's valiant efforts to make the constitutional provisions a living reality for the masses. Furthermore in *People's Union for Democratic Rights*,<sup>211</sup> although the state steadfastly contended that payment of inadequate wages did not amount to forced labor, the Court rejected this specious argument.<sup>212</sup> The Court reasoned that given the acute inequalities in Indian society, where compulsion of economic circumstances leads workers to accept work for inadequate wages, it is tantamount to "forced labour."<sup>213</sup> Force cannot be construed to mean only physical or legal force.<sup>214</sup> Therefore, payment of inadequate wages is violative of the freedom from exploitation—a right that is available against the whole world.<sup>215</sup>

While examining the post-Emergency era in India, it is important to examine whether courts have overstepped the supposedly original intention of the framers when articulating rights not expressly mentioned in the Constitution. It may seem that the Court may have surpassed the founding fathers' intent. Nonetheless, its construction of Part III of the Constitution has remained within constitutional parameters and incorporated the inherent spirit of the Constitution that underscores social justice and human dignity.

A danger, however, still lurks. While broadening the scope and ambit of Part III, the Court may be unwittingly "invit[ing] an uncontrollable sprawl" of fundamental rights.<sup>216</sup> This type of sprawl would

---

210. See *supra* Part II.A (discussing cases following *Maneka Gandhi v. Union of India* where the Supreme Court expanded the scope of fundamental rights guaranteed to Indians—commonly considered Social Action Litigation ("SAL") cases).

211. A.I.R. 1982 S.C. 1473.

212. See *id.* at 1480.

213. *Id.* at 1490.

214. See *id.*

215. See *id.* at 1482-83.

216. See Rajeev Dhavan & Jeevan Reddy, *The Jurisprudence of Human Rights*, in HUMAN RIGHTS AND JUDICIAL REVIEW 174, 204 (David Beatty ed., 1990).

lead to a "grotesque result."<sup>217</sup> Fortunately, the Court is aware of this matter and has exercised caution in accepting spurious claims masquerading as alleged human rights violations. It has consequently rejected "the theory that a peripheral or concomitant right which facilitates the exercise of a named fundamental right or gives it meaning and substance or makes its exercise effective is itself a fundamental right."<sup>218</sup> Yet, certain instances arise where leaving some aspects of a freedom unprotected result in the freedom itself becoming ineffective. Indeed, the Supreme Court of India has faced some of these issues. For example, the government has imposed unfair and onerous taxes on the press and has controlled the supply of newsprint.<sup>219</sup> Although the Constitution does not specifically articulate freedom of the press, the Court protected crucial aspects of this right so as to render the freedom meaningful. The Court retained the value of this freedom under the rubric of protecting the Indian people's fundamental right to speech and expression.<sup>220</sup>

The expanding scope of fundamental rights in India also sheds light on a characteristic of many third world nations—the State's lawlessness and its scant regard to the constitutional ethic.<sup>221</sup> Seen in this light, the Indian Supreme Court must be applauded for its tireless and impassioned calls to the government to take the Constitution seriously and respect the dignity of those it governs. Article 39 of the Constitution mandates the state to provide free legal services to the poor.<sup>222</sup> For three long decades, however, Parliament demonstrably ignored this provision because of its political preoccupations. The is-

217. *Id.*

218. *Maneka Gandhi v. Union of India*, A.I.R. 1978 S.C. 597, 642.

219. *Accord Bennet Coleman & Co. v. Union of India*, A.I.R. 1973 S.C. 106 (concerning newsprint); *Indian Express Newspapers (Bombay) Pvt. Ltd. v. Union of India*, (1985) 1 S.C.C. 641; *Prabha Dutt v. Union of India*, A.I.R. 1982 S.C. 6; *The Printers (Mysore) Ltd. v. Asst. Commercial Tax Officer JT 1994 (1) S.C. 692*.

220. *See, e.g., Bennet Coleman & Co.*, A.I.R. 1973 S.C. 106 (protecting freedom of the press under the fundamental right to speech and expression).

221. *See Radhika Coomaraswamy, Uses and Usurpation of Constitutional Ideology, in CONSTITUTIONALISM AND DEMOCRACY 159, 163-65* (Douglas et al. eds., 1993); *cf. supra* note 180 and accompanying text (discussing Indian officials' inappropriate behavior).

222. *See INDIA CONST.* pt. IV, art. 39A, *reprinted in VII CONSTITUTIONS OF THE COUNTRIES OF THE WORLD, supra* note 7, at 1, 78.

sue was ultimately left to the judiciary—the least democratic organ of the government—to articulate the right to free legal services and prod the government to fulfill its mandate.<sup>223</sup> While the Court has been able to deliver more than what citizens traditionally expect, there are instances where the Court has done less. In the Pavement Dwellers Case,<sup>224</sup> although the petitioners pleaded the Court to order the State to undertake a low-income housing program in Bombay, the Court confined itself to suggesting that such programs be “pursued earnestly” and “implemented without delay.”<sup>225</sup> The Court in India thus plays a political role with unclear legislative and adjudicative functions.<sup>226</sup>

In articulating new rights and coming to the succor of the poor and oppressed, the Court has made bold and impressive forays into uncharted areas of social justice. There is a danger, however, that the Court may falter and reject the just claims espoused by unpopular minorities on the basis that “a majoritarian understanding expressed through judicial discourse finds them morally offensive.”<sup>227</sup> For instance, homosexuals in India have demanded the repeal of a few discriminatory provisions of the Indian Penal Code that criminalizes certain types of sexual activity. It is therefore imperative that in the future, the Court evaluates the “moral worth of human rights claims”<sup>228</sup> with an “expansive wisdom . . . so as to preserve the right of all human beings to mutual respect and concern.”<sup>229</sup>

It is interesting to note that the newly evolved human rights jurisprudence in India owes its origin to the creativity of a few activist Supreme Court judges of the late 1970s, such as P.N. Bhagwati, widely regarded as the father of India’s judicial renaissance, Krishna

---

223. See *supra* notes 177-78 and accompanying text (discussing *M.H. Hoskot* case where the Supreme Court declared free legal services a fundamental right).

224. See generally *Olga Tellis v. Bombay Mun. Corp.*, A.I.R. 1986 S.C. 180 (illustrating a situation where the Court merely suggested, instead of required, action to protect rights of the indigent).

225. *Id.*

226. See Baxi, *supra* note 160, at 33 (examining the political role of the Supreme Court of India).

227. Dhavan & Reddy, *supra* note 216, at 195.

228. *Id.*

229. *Id.* at 205.



Iyer, R.S. Pathak, and Chadrachud.<sup>230</sup> Fortunately, some of their successors, including Justices Kuldip Singh, J.S. Verma, and Venkatachaliah have maintained this activist momentum. Today, many of the rights recognized in international instruments—including the right to travel abroad, privacy, freedom from torture, right to a speedy trial, and the right to a wholesome environment—have become a proud part of Part III of India's Constitution solely because of perceptive judicial exegesis.

#### D. REMEDIES FOR VIOLATIONS OF RIGHTS

Human rights are empty declarations unless buoyed with means of enforcement and protection. Because India is a functioning democracy, some remedies for the abuse of citizens' rights are implied in the theory and structure of government. The right to vote, to select one's representatives for the three tiers of government—Parliament, state legislatures, and the village *panchayats*—and the right to replace representatives if they abuse citizens' rights, are crucial remedies in this regard. Significantly, adult franchise has existed since independence, and no segment of the population is without the right to vote. The potency of this remedy was amply evident in 1977, when Indira Gandhi revoked the Emergency and called for general elections. As a result of the atrocities her government committed during the Emergency, both she and the party were routed in the hustings, and the Janata Party came into power with a clear majority. Since the commencement of the Constitution in 1950, except for the brief Emergency period, India has held periodic general elections, affirming the democratic power of the people. Further, the Constitution includes other protective devices, such as the power of judicial review contained in Article 13,<sup>231</sup> which allows every citizen to ask the Supreme Court for the vindication of his fundamental rights.

---

230. See P.N. Bhagwati, *Social Action Litigation: The Indian Experience*, in *THE ROLE OF THE JUDICIARY IN PLURAL SOCIETIES*, *supra* note 160, at 21.

231. See INDIA CONST. pt. III, art. 13, *reprinted in VII CONSTITUTIONS OF THE COUNTRIES OF THE WORLD*, *supra* note 7, at 1, 33-34 (concerning "laws that are inconsistent with or in derogation of the fundamental rights").

## E. INNOVATIVE &amp; AFFIRMATIVE REMEDIES

During the Supreme Court's first three decades, it performed the traditional function of presiding over adversarial legal proceedings and issuing orders to the parties.<sup>232</sup> Given this limited function, traditional Anglo-Saxon remedies proved adequate in dispensing justice. In its new role as social auditor, however, the Court further provides socio-economic and environmental justice to the common man.

In short, the Court set for itself a new socio-economic destination and consequently formulated "meta-rights,"<sup>233</sup> which are "the collective social rights and duties of groups, classes, and communities."<sup>234</sup> Meta-rights were necessary because the litigants consisted of individuals drawn from the lowest rung of society: slum dwellers, torture victims, prisoners, migrant laborers, and women and children from destitute homes.<sup>235</sup> These people brought to the docket an array of novel issues never before addressed by the Court.<sup>236</sup> Accordingly, the Court faced the issue of whether law based on traditional Anglo-Saxon principles could properly dispense equitable and distributive justice in these circumstances.

It is a tribute to the craftsmanship of the Indian judiciary that it created novel procedural innovations, which adhere to constitutional principles and ground realities. This triggered a silent, judge-led revolution called the Social Action Litigation movement ("SAL"), or Public Interest Litigation ("PIL") movement, in India.<sup>237</sup>

232. See generally Bhagwati, *supra* note 230 (defining the Court's role before its shift towards being a social auditor).

233. See S.P. Gupta v. Union of India, A.I.R. 1982 S.C. 149, 192 (showing Justice Bhagwati's use of meta-rights in his landmark decision); see also Mauro Cappalatti, *Vindicating the Public Interest through the Courts: A Comparativist's Contribution, in ACCESS TO JUSTICE: EMERGING ISSUES AND PERSPECTIVES* 513 (M. Cappalatti & B. Garth eds., 1979) (defining meta-rights). In this article, Cappalatti opines Public Interest Litigation responded to the "massification phenomenon," in which important rights were considered diffuse and meta-individual. See *id.*

234. Bhagwati, *supra* note 230, at 21.

235. See *id.* at 25-27.

236. See *id.* at 27.

237. See *id.* at 20-31 (discussing the birth of the SAL and PIL movements in India).

The first procedural innovation introduced by the Court in the beginning stages of the movement was a broadening of the concept of *locus standi*. This innovation opened the courts to people who were previously required to show personal injury.<sup>238</sup> In the words of Justice Bhagwati, the father of the SAL movement:

[W]here a legal wrong or legal injury is caused to a person or to a determinate class of persons by reason of violation of any constitutional or legal right and such person or determinate class of persons is by reason of poverty, helplessness, or disability or socially or economically disadvantaged position unable to approach the Court for relief, any member of the public can maintain an action for an appropriate direction, order or writ.<sup>239</sup>

Popular access to courts brought into judicial focus rights violations previously hidden from the public eye, including torture of prisoners and police detainees, existence of bonded labor, ill-treatment of migrant laborers, and exploitation of women and children. Prisoners, laborers, torture victims, exploited women and children, mental patients and other vulnerable groups whose voices had so long gone unheard now found a forum for their grievances.<sup>240</sup> Of late, PIL has become a powerful weapon in exposing corruption in high places and ensuring the accountability of public leaders.<sup>241</sup> It was a PIL petition that exposed former Prime Minister P.V. Nara-

238. See generally *S.R. Gupta*, A.I.R. 1982 S.C. 149 (illustrating the Court's initial broadening of *locus standi*).

239. *Id.* at 188.

240. See *Kadra Pahadiya v. State of Bihar*, A.I.R. 1982 S.C. 1167 ("In the present case but for the letter written by the Free Legal Aid Committee, these unfortunate prisoners, deprived of freedom and liberty . . . would have continued to remain in jail without any hope of ever becoming free."); *Prem S. Shukla v. Delhi Admin.*, A.I.R. 1980 S.C. 1535 (concerning the handcuffing of prisoners); *Khatri v. State of Bihar*, A.I.R. 1981 S.C. 928 (discussing the ill placement of blind prisoners); *Sunil Batra v. Delhi Admin.*, A.I.R. 1980 S.C. 1579 (involving a prisoner who was abused by a warden's baton); *Hussainara Khatoun v. State of Bihar*, A.I.R. 1979 S.C. 1360 (granting pretrial releases for men, women, and children on the basis that "it is a crying shame on the judicial system which permits incarceration. . . for such long periods of time without trial").

241. See *Sumit Mitra & Sayantan Chakravarty, Locking Horns: Judiciary vs. Executive*, INDIA TODAY, July 28, 1997, at 22-27; *Manoj Mitta, Supreme Court—Setting the Agenda*, INDIA TODAY, Feb. 15, 1996, at 34; *Manoj Mitta & Raj Kumar Jha, Judiciary: Mr. Justice J.S. Verma*, INDIA TODAY, Mar. 15, 1996, at 98.

simha Rao's alleged bribing of certain Parliament members.<sup>242</sup> Similarly, a PIL petition brought the Jain-Hawala case, involving corruption to the tune of several millions, to the judicial docket.<sup>243</sup> As one Supreme Court judge remarked, "This [PIL] seems to be of singular importance in the history of Indian parliamentary democracy."<sup>244</sup> "Only PIL can expose graft in high places,"<sup>245</sup> rightly opines a senior attorney.

The Court also introduced "epistolary jurisdiction."<sup>246</sup> Generally, a court forsakes formalism and grants judicial proceedings in an "epistolary fashion" when freedom is at stake.<sup>247</sup> For example, the Supreme Court treated letters communicating the torture of prisoners,<sup>248</sup> the despicable plight of women in state-run welfare homes,<sup>249</sup> the plight of inmates in a mental institution,<sup>250</sup> the degradation of the environment,<sup>251</sup> the existence of bonded labor,<sup>252</sup> and the eviction of

---

242. See Mitra & Chakravarty, *supra* note 241, at 26; Charulata Joshi, *CBI: Going Soft on the PM*, INDIA TODAY, Feb. 29, 1996, at 22; Charulata Joshi, *JMM Payoffs Case: Tortuous Progress*, INDIA TODAY, Dec. 31, 1996, at 20 (describing the bribery of Parliament members for their support during the 1993 non-confidence motion).

243. See Mitra & Chakravarty, *supra* note 241, at 24-26; Zafar Agha, *Hawala: Congress—Explosive Fallout*, INDIA TODAY, Feb. 15, 1996, at 22; Bharat Desai, *Hawala: Jain Family: The Bold and the Brazen*, INDIA TODAY, Feb. 15, 1996, at 40; Charluata Joshi, *Hawala Charge Sheets: Inexplicable lapses*, INDIA TODAY, Feb. 15, 1996, at 34; Charulata Joshi, *Hawala Case*, INDIA TODAY, Mar. 15, 1996, at 30; N.K. Singh, *Hawala: BJP Tarrred with the same Brush*, INDIA TODAY, Feb. 15, 1996, at 28.

244. Mitra & Chakravarty, *supra* note 241, at 24.

245. *Id.* at 26.

246. See generally Sunil Batra v. Delhi Admin. 1980 S.C. 1579 (allowing a letter written by another prisoner to constitute a writ petition).

247. Accord *id.* (invoking epistolary jurisdiction); Prem Shanker v. Delhi Admin, A.I.R. 1980 S.C. 1535 Vikram Deo Singh Tomar v. State of Bihar, 1988 Supp. S.C.C. 734, 736; Sheela Barse v. State of Maharashtra, A.I.R. 1983 S.C. 378.

248. See Sunhil Batra v. Delhi Admin., 1980 S.C. 1579.

249. See Upendra Baxi v. State of U.P., A.I.R. 1987 S.C. 191.

250. See Veena Sethi v. State of Bihar, (1982) 2 S.C.C. 583; Vikram Deo Singh Tomar v. State of Bihar, 1988 Supp. S.C.C. 734, 736; Sheela Barse v. State of Maharashtra, A.I.R. 1983 S.C. 378.

251. See Rural Litigation & Entitlement Kendra, Dehradun v. State of Uttar Pradesh, A.I.R. 1985 S.C. 652.

pavement dwellers,<sup>253</sup> as writ petitions and initiated judicial proceedings. Furthermore, in *Nilabati Behera v. State of Orissa*,<sup>254</sup> the Court treated a letter from a hapless mother complaining of the death of her son in police custody as a writ petition.<sup>255</sup>

In *Sunil Batra v. Delhi Administration*,<sup>256</sup> a prisoner exposed—via a postcard to the Supreme Court—the brutal assault on another inmate by a prison official.<sup>257</sup> The Court treated this letter as a habeas corpus petition.<sup>258</sup> Particularly, the Court in *Sunil Batra* broadened the scope of habeas corpus making the writ available to a prisoner for the protection of a constitutional right—freedom from torture—to which he was lawfully entitled even while in confinement.<sup>259</sup>

Throughout the movement, where parties were too weak to secure evidence, the Court appointed a diverse group of social activists, teachers, scholars, journalists, bureaucrats, and judicial officers, to act as “commissioners” and assist in the expensive task of gathering evidence.<sup>260</sup> Thus, the Court adopted a “more positive attitude in determining the facts.”<sup>261</sup> In a case involving the ecological deterioration of a national park, the Court appointed a commission to assess the consequences that mining had on the park’s wildlife and environment.<sup>262</sup> Further, the Court directed the commission to make appropriate recommendations for addressing potential threats to the environment.<sup>263</sup>

252. See *People’s Union for Democratic Rights v. Union of India*, A.I.R. 1982 S.C. 1473.

253. See *Olga Tellis v. Bombay Mun. Corp.*, A.I.R. 1986 S.C. 180.

254. A.I.R. 1993 S.C. 1960.

255. See *id.*

256. A.I.R. 1980 S.C. 1579.

257. See *id.*

258. See *id.* at 1582.

259. See *id.* at 1586 (explaining that the habeas writ “has functional plurality and the constitutional regard for human decency and dignity is tested by this capability.”).

260. See *Bhagwati*, *supra* note 230, at 25-28.

261. *Bandhua Mukti Morcha v. Union of India*, A.I.R. 1984 S.C. 802, 841.

262. See *Tarun Bhagat Sangh, Alwar v. Union of India*, A.I.R. 1993 S.C. 223.

263. See *id.*

In cases involving openly scandalous rights violations for which traditional remedies were inadequate, the Court gave immediate and significant interim relief, deferring its final decision on factual issues and legal liability. In *Khatari v. State of Bihar*,<sup>264</sup> the Bagalpur blinding case, the police allegedly tortured and blinded several pre-trial prisoners.<sup>265</sup> The court directed the Bihar State government to provide medical and rehabilitative services to the blinded prisoners before determining the police officers' culpability.<sup>266</sup> Likewise, in *M.C. Mehta v. Union of India*,<sup>267</sup> a case involving the emission of noxious gases from a privately owned factory, the Court ordered the closure of the plant and set up a victim compensation scheme within days of the petition's filing.<sup>268</sup> Thus, the Court in *Khatari* and *M.C. Mehta* made interim decisions prior to determining the culpability of the police officers and whether it had jurisdiction under Article 32 of the Constitution in order to provide relief against a private entity.<sup>269</sup>

The Court has also addressed human rights violations that are administrative in nature without hesitation. Lawless disregard of statutory or constitutionally imposed administrative duties can now result in human rights violations.<sup>270</sup> For instance, in a case involving abhorrent conditions in a mental institution, the Court immersed itself in administrative minutiae.<sup>271</sup> The Court went to the extent of directing hospital authorities on the amounts of money to spend for meals and

---

264. A.I.R. 1981 S.C. 928.

265. *See id.*

266. *See id.*; *see also* Hussainara Khatoon v. State of Bihar, A.I.R. 1979 S.C. 1369 (involving directions by the Supreme Court to the State administration to provide free legal services to indigent prisoners even while their cases remained pending and the final decision was not made until several years later).

267. A.I.R. 1987 S.C. 965.

268. *See id.*

269. *See id.*

270. *See* Baxi, *supra* note 160, at 41 (noting that the Court recognized the rights of the poor during the post-Emergency period).

271. *See* Rakesh Chandra Narayan v. State of Bihar, A.I.R. 1989 S.C. 348.

medicines.<sup>272</sup> Further, it called for removal of management-imposed limits that curtailed the purchase of drugs for inmates.<sup>273</sup>

The preceding analysis demonstrates that the Indian Supreme Court has developed an indigenous jurisprudence appropriate to its own institutional and sociological environment. In doing so, the Court has protected the masses by securing their basic human rights. Though PIL has some drawbacks, its benefits include deterring lawlessness, creating positive publicity, and serving as a catalyst for legislative action.<sup>274</sup> In a society where “freedoms suffer from atrophy and activism is essential for participative public justice, some risks have to be taken.”<sup>275</sup>

One can say that judicial review has led to the progress of constitutionalism in India. On account of these decisions, the Court has engendered respect for the Constitution and for fundamental rights, notwithstanding denial by the government of rights violations or its slow response in implementing the Court’s directives. Judicial review has worked well in India because of the single unified judicial system headed by the Supreme Court. There are no separate constitutional courts in India. The unified judicial system therefore permits constitutional issues to be raised in any case in any court in the country, pending ultimate resolution by the Supreme Court. This procedure minimizes the danger of differences of opinion arising out of the constitutionality of constitutional provisions.

Since the Court’s record of protecting human rights and upholding the rule of law has been encouraging, it might be wise to consider constitutional litigation as one of the viable strategies for liberating

---

272. *See id.* at 352-353.

273. *See id.*

274. In *Mehta v. Union of India*, the Court recommended that the government set up environmental courts comprised of a professional judge and two environmental scientists, to deal with the plethora of environmental issues brought before the Court. *See M.C. Mehta v. Union of India*, (1986) 2 S.C.C. 176. Last year, the Federal Government set up the National Environmental Appellate Authority—a quasi-judicial body headed by a retired judge of the Supreme Court. *See* MINISTRY OF ENVIRONMENTS AND FORESTS, ANNUAL REPORT OF THE GOVERNMENT OF INDIA (visited Nov. 30, 1998) <<http://www.nic.in/envfor/report/report.html>>.

275. *Fertilizer Corp. Kamgar Union v. Union of India* (1981) 1 S.C.C. 568; *see also infra* Part V.A (discussing the criticism that PIL has received).

the poor and the downtrodden. It is no wonder, then, that foreign jurists and scholars have applauded the Indian Supreme Court.<sup>276</sup>

### III. INDIAN CONSTITUTIONALISM AND INTERNATIONAL HUMAN RIGHTS

Today, the constitutions of almost all of the world's 160 nations incorporate protection of human rights. This section explores the influence of international developments on Indian constitutional jurisprudence.

The end of World War II heralded the dawn of a new era in which violations of freedoms and rights no longer remained within the exclusive dominion of domestic concern. Indeed, the United Nations Charter,<sup>277</sup> the most widely ratified instrument in the world, established human rights as a matter of international concern. In 1948, the United Nations General Assembly adopted the Universal Declaration of Human Rights,<sup>278</sup> articulating the importance of rights that were threatened during the 1940s. Following the adoption of the Universal Declaration, two other important human rights instruments were drafted: the International Covenant on Civil and Political Rights ("ICCPR")<sup>279</sup> and the International Covenant on Economic Social and Cultural Rights ("ICESCR").<sup>280</sup> These three instruments comprise the International Bill of Human Rights—a comprehensive bundle of human rights obligations that the United Nations imposes on its members.<sup>281</sup>

---

276. See, e.g., DAVID BEATTY, *CONSTITUTIONAL LAW IN THEORY AND PRACTICE* 115 (1995) (noting that "the way in which the [Indian] Supreme Court has exercised its powers of review for almost fifty years shows that it is every bit as strong a defender of personal freedom and human dignity as any of the major courts in the free and democratic world").

277. U.N. CHARTER, *reprinted in* *SELECTED INTERNATIONAL HUMAN RIGHTS INSTRUMENTS* 1 (Frank Newman & David Weissbrodt eds., 1990).

278. See *Universal Declaration of Human Rights*, *supra* note 10.

279. See *International Covenant on Civil and Political Rights*, *supra* note 21.

280. See *International Covenant on Economic, Social and Cultural Rights*, *supra* note 22.

281. See B.G. RAMCHARAN, *THE CONCEPT AND PRESENT STATUS OF THE INTERNATIONAL PROTECTION OF HUMAN RIGHTS: FORTY YEARS AFTER THE UNIVERSAL DECLARATION* 39 (1989) (discussing the International Bill of Human Rights, which is "the legal basis of protection").



There are also conventions dealing with genocide,<sup>282</sup> racial discrimination,<sup>283</sup> discrimination against women,<sup>284</sup> torture and other cruel, inhuman or degrading treatment or punishment,<sup>285</sup> rights of the child,<sup>286</sup> and the rights of refugees.<sup>287</sup> Yet, there is no regional agreement for protecting human rights exclusively in Asia, despite the existence of comprehensive regional agreements for Africa, the Americas, and Europe. Examples of these regional agreements include: the African Charter on Human and People's Rights;<sup>288</sup> the American Convention on Human Rights;<sup>289</sup> and the European Convention on Human Rights.<sup>290</sup> Today, the codification of human rights law surpasses the codification of all other areas of international law.<sup>291</sup>

---

282. See *Convention on the Prevention and Punishment of the Crime of Genocide*, Dec. 9, 1948, 78 U.N.T.S. 27 ("recognising that at all periods of history genocide has inflicted great losses on humanity, and . . . convinced that in order to liberate mankind from such odious, scourge, international co-operation is required.").

283. See *International Convention on the Elimination of All Forms of Racial Discrimination*, 660 U.N.T.S. 195, opened for signature Mar. 7, 1966.

284. See *Convention on the Elimination of all Forms of Discrimination Against Women*, G.A. Res. 34/180, U.N. GAOR, Supp. No. 46, at 193, U.N. Doc. A/34/180 (entered into force Sept. 3, 1981).

285. See *Convention Against Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment*, G.A. Res. 46, U.N. GAOR, Supp. No. 51, at 197, U.N. Doc. A/39/51 (1984) (providing entire text of the convention).

286. See *Convention on the Rights of the Child*, G.A. Res. 44/25, U.N. GAOR, Supp. No. 49, at 167, U.N. Doc. A/44/736 (1989).

287. See *Convention Relating to the Status of Refugees*, July 28, 1951, 189 U.N.T.S. 150.

288. See *id.* at 52 (providing full text of the African [Banjul] Charter on Human and Peoples' Rights, adopted June 27, 1981).

289. See *American Convention on Human Rights*, reprinted in *SELECTED HUMAN RIGHTS INSTRUMENTS*, *supra* note 277, at 155; see also *American Declaration of the Rights and Duties of Man*, reprinted in *SELECTED HUMAN RIGHTS INSTRUMENTS*, *supra* note 277, at 173.

290. See *Convention for the Protection of Human Rights and Fundamental Freedoms*, Nov. 4, 1950, 213 U.N.T.S. 222.

291. See FRANK NEWMAN & DAVID WEISSBRODT, *INTERNATIONAL HUMAN RIGHTS: LAW, POLICY AND PROCESS* 9 (2d. ed. 1996) (stating that "[h]uman rights law has thus become the most codified domain of international law").

### A. THE INDIAN CONSTITUTION AND THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

The Indian Constitution and the International Bill of Rights are both products of the post-World War II era—a significant turning point in furthering human rights. The United Nations General Assembly adopted the Universal Declaration of Human Rights in 1948—when India's Constituent Assembly members were still engaged in the task of framing the Constitution.<sup>292</sup> The inspirational influence of this great charter of liberties on the framing of India's Constitution cannot be denied.<sup>293</sup> Interestingly, the human rights content in both the Indian Constitution and the International Bill of Rights have a common provenance: the United States Constitution and the United States Bill of Rights.<sup>294</sup>

The United States Constitution and the Bill of Rights were over 150 years old when the international human rights movement was born. No one can seriously deny the significant contribution the United States has made to the universalization and internationalization of human rights.<sup>295</sup> Many civil and political rights recognized in the ICCPR are familiar and congenial to Indian constitutional jurisprudence. Most of the rights articulated by the ICCPR were available to Indian citizens twenty-nine years before India became a party to the Covenant.

The following table shows rights contained in both the Indian Constitution and the ICCPR. There are, however, some rights recognized in the ICCPR—such as right to a speedy trial,<sup>296</sup> right to free

292. See *Universal Declaration of Human Rights*, *supra* note 10.

293. See *Maneka Gandhi v. Union of India*, A.I.R. 1978 S.C. 616, 637.

294. See generally M. Abel, *American Influences on the Making of the Indian Constitution*, 1 J. CONST. PARLIAMENTARY STUD. 35 (1967) (stating that practically every fundamental right provided in the United States Bill of Rights is replicated in the Indian Constitution).

295. See generally Richard B. Lillich, *The United States Constitution and International Human Rights Law*, 3 HARV. HUM. RTS. J. 53 (1990) (arguing that United States constitutionalism has contributed significantly to the development of international human rights law).

296. See *International Covenant on Civil and Political Rights*, *supra* note 21, at pt. III, art. 14 (3) (c) (stating that “[i]n the determination of any criminal charge against him everyone shall be entitled . . . to be tried without undue delay”) *Cf. su-*

legal services,<sup>297</sup> freedom from imprisonment to fulfil a contractual obligation,<sup>298</sup> right to travel abroad,<sup>299</sup> right to privacy,<sup>300</sup> freedom from torture, cruel, inhuman, degrading treatment or punishment<sup>301</sup> and a right to compensation to the victims of unlawful arrest or detention<sup>302</sup>—that are not expressly guaranteed in Part III of India's Constitution.

---

*pra* notes 174-78 and accompanying text (noting that Article 21 of the Constitution mandates a speedy trial for an accused in the aftermath of *Maneka Gandhi*).

297. See *International Covenant on Civil and Political Rights*, *supra* note 21, at art. 14 (3) (d) (stating “[e]veryone shall be entitled to . . . be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this rights; and to have legal assistance assigned to him. . . .”). Cf. *supra* note 178 and accompanying text (discussing the Supreme Court of India's declaration of free legal services as within Article 21 of the Constitution).

298. See *International Covenant on Civil and Political Rights*, *supra* note 21, art. 11 (stating that “[n]o one shall be imprisoned merely on the ground of inability to fulfil a contractual obligation.”). Cf. *supra* note 179 and accompanying text (discussing *Jolly George Varghese v. Bank of Cochin*, where the Supreme Court of India prohibited the incarceration of a judgement debtor who could not afford to pay his debt).

299. See *International Covenant on Civil and Political Rights*, *supra* note 21, at art.12 (2) (stating “[e]veryone shall be free to leave any country including his own.”).

300. See *id.* art. 7 (stating “[n]o one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful action on his honor and reputation.”).

301. See *International Covenant on Civil and Political Rights*, *supra* note 21, art. 17 (stating that “[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”). Cf. *generally supra* notes 162-230 and accompanying text (discussing the role of judicial review in improving the treatment of prisoners, laborers, and men and women of India).

302. See *International Covenant on Civil and Political Rights*, *supra* note 21, art. 9(5) (stating that “[a]nyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.”).

RIGHTS CONTAINED IN BOTH THE INDIAN CONSTITUTION  
AND THE INTERNATIONAL COVENANT ON CIVIL AND  
POLITICAL RIGHTS

ICCPR	INDIAN CONSTITUTION	RIGHT
Article 8 (3)	Article 23	Freedom from forced or compulsory labor
Article 14 (1)	Article 14	Right to equality
Article 26	Article 15	Protection against discrimination on any ground
Article 25 (c)	Article 16 (1)	Right to have access to public service
Article 19 (1) & (2)	Article 19 (1) (a)	Freedom of speech and expression
Article 21	Article 19 (1) (b)	Right of peaceful assembly
Article 22 (1)	Article 19 (1) (c)	Freedom of association
Article 12 (1)	Article 19 (1) (d) & (e)	Freedom of movement and freedom to choose one's own residence
Article 15 (1)	Article 20 (1)	Freedom from ex post facto legislation
Article 6 (1) & 9 (1)	Article 21	Right to life and personal liberty
Article 9 (2) & (4)	Article 22 & 32	Right to be informed of charges of arrest; and Right to legal remedies if right denied
Article 18 (1)	Article 25	Freedom of thought, conscience and religion
Article 27	Article 29 (1) & 30	Right of minorities to preserve their own language and culture

B. THE EMERGENCY PROVISIONS IN THE INDIAN CONSTITUTION  
AND THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL  
RIGHTS

The ICCPR forbids torture and summary killing in all circumstances, but creates emergency exceptions to guarantees of due process, free speech, and other political liberties. When an emergency threatens the life of the nation, a government may formally derogate from ICCPR guarantees of due process, and use preventive detention within certain limits.<sup>303</sup> The emergency must be one that “threatens the life of the nation and one whose existence is officially proclaimed.”<sup>304</sup> The ICCPR, however, explicitly provides that during such emergencies there cannot be any derogation of certain rights, including, but not limited to, the right to life and freedom from torture.<sup>305</sup> Article 4 of the ICCPR additionally provides other safeguards against the abuse of emergency provisions in the Covenant by States Parties.<sup>306</sup>

Originally, the Indian Constitution provided for the suspension of fundamental rights listed under Article 19 during an emergency. Similarly, the enforcement of other rights conferred by the Constitution could be suspended during an emergency by the President simply giving a declaratory order to that effect.<sup>307</sup> The late Indira Gandhi, former Prime Minister of India, abused this constitutional provision when she declared a national emergency.<sup>308</sup> In *Additional District*

---

303. See *id.* art. 4, para. 1 (allowing derogation “to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law”).

304. See *id.*

305. See *id.* art. 4, para. 2.

306. See *id.* art. 4, para. 3 (mandating that “[a]ny State Party to the covenant availing itself of the right of derogation shall immediately inform the other State Parties”).

307. See INDIA CONST. pt. XVIII, art. 352, reprinted in VII CONSTITUTIONS OF THE COUNTRIES OF THE WORLD, *supra* note 7, at 1, 233-34 (stating that if the President believes a grave emergency threatens India’s security, he may, with discretion, declare a state of emergency).

308. See Nanda, *supra* note 157 (repudiating Indira Gandhi’s justification for declaration of emergency).

*Magistrate v. Shivkant Shukla*,<sup>309</sup> the Indian Supreme Court unfortunately upheld Indira Gandhi's Emergency and refused to issue a writ of habeas corpus for the enforcement of the plaintiff's constitutional rights.<sup>310</sup>

Once the government revoked the Emergency in 1977, the Janata Party came to power and there was a vociferous public demand for amending the Constitution's emergency provisions to prevent future abuse. The Forty-fourth Constitution (Amendment) Act ensued.<sup>311</sup> This Act crucially changed the provisions pertaining to the suspension of fundamental rights during an emergency. Under this Act, there can be no suspension of the rights conferred by Articles 20 and 21 during an emergency declared on any ground. Further, as a result of this amendment, laws unconnected with an emergency can be challenged in a court of law during the emergency.<sup>312</sup> These changes have made the constitutional provisions consistent to some extent with the ICCPR.<sup>313</sup>

As a party to the ICCPR, however, India needs to continue to improve its human rights record to conform with all of the ICCPR's provisions. Among the several recommendations made by the Human Rights Committee in this regard is one requiring India to main-

---

309. A.I.R. 1976 S.C. 1206.

310. See Sripati, *supra* note 14, at 106-07 n.105 (providing a detailed explanation of *Additional District Magistrate v. Shivkant Shukla*).

311. See INDIA CONST. pt. XVIII, art. 359, cl. 1, *reprinted in VII CONSTITUTIONS OF THE COUNTRIES OF THE WORLD, supra* note 7, at 1, 238-39 n.8 (substituting "the President may by order declare that the rights to move any court for the enforcement of the rights conferred by Part III" to "the President may by order declare that the rights to move any court for the enforcement of such the right conferred by Part III (except Articles 20 and 21). . . ."); Sripati, *supra* note 14, at 107 n.107 (stating that as a result of the 44th Amendment, Article 21 can no longer be suspended during the proclamation of an emergency).

312. See INDIA CONST. pt. XVIII, art. 358, cl. 2 (a), *reprinted in VII CONSTITUTIONS OF THE COUNTRIES OF THE WORLD, supra* note 7, at 1, 238 (stating that "[n]othing in clause 1", which notes that nothing in Article 19 shall restrict the power of the state to make any law during an emergency "shall apply to any law which does not contain a recital to the effect that such law is in relation to the proclamation of emergency in operation when it is made").

313. See, e.g., *International Covenant on Civil and Political Rights, supra* note 21, at pt. III, art. 9, cl. 2 (stating "[e]veryone has the right to liberty and security of person").

tain a register of detainees being held under preventive detention laws.<sup>314</sup> This recommendation deserves to be implemented without delay.

### C. THE INDIAN CONSTITUTION AND THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL, AND CULTURAL RIGHTS

The United Nations drafted the ICCPR and ICESCR for acceptance by the states. Many states attained independence in the aftermath of World War II. After tasting the bitter experience of foreign subjugation, these newly independent states zealously safeguarded their hard-won freedom. Specifically, these states strongly opposed the replication of their colonial experiences. Consequently, the ICCPR and ICESCR show great deference to state sovereignty.<sup>315</sup> These newly independent states chose to follow the model of the welfare state as opposed to the liberal state. The ICESCR therefore requires states to recognize the right of all human beings to social security;<sup>316</sup> the right to work<sup>317</sup> and to receive equal pay for equal work;<sup>318</sup> the right to leisure;<sup>319</sup> the right to an adequate standard of living, including food, clothing, and housing;<sup>320</sup> and the right to education.<sup>321</sup> States that are parties to this instrument must realize those

314. See Emma Blower, *Rights and Wrongs*, FRONTLINE, Oct. 3, 1997, at 47.

315. See Alessandra Luini Del Russo, *International Law of Human Rights: A Pragmatic Appraisal*, 9 WM. & MARY L. REV. 749, 751-53 (1968) (criticising the low level of compliance required under the ICCPR and ICESCR for Member countries).

316. See *International Covenant on Economic, Social and Cultural Rights*, *supra* note 22, pt. III, art. 9 ("The States Parties to the present Covenant recognise the right of everyone to social security, including social insurance.").

317. See *id.* art. 6 ("The States Parties to the present Covenant recognize the right to work . . .").

318. See *id.* art. 7 (a)(i) ("The States Parties . . . recognize the right of . . . remuneration which provides all workers a minimum with: fair wages and equal remuneration for work of equal value without distinction of any kind . . .").

319. See *id.* art. 7 (d) ("The States Parties . . . recognize the right of everyone to . . . rest, leisure and reasonable limitation of working hours.").

320. See *id.* art. 11 ("The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the improvement of living conditions.").

321. See *id.* art. 13 (1) ("The States Parties to the present Covenant recognize

rights “progressively” to the “maximum of their available resources.”<sup>322</sup>

Like other newly independent states, India was predestined to be a welfare state deeply committed to twentieth century socio-economic goals. Indeed, the Indian Constitution—a social document—articulates certain socio-economic responsibilities of the state in the form of Directive Principles of State Policy.<sup>323</sup> Accordingly, some provisions of Part IV of the Indian Constitution, which contains the Directive Principles, correspond to the economic and social rights recognized in ICESCR. The following table provides the relevant sections of the ICESCR and the corresponding Directive Principles of the Indian Constitution.

#### RIGHTS CONTAINED IN BOTH THE ICESCR AND THE INDIAN CONSTITUTION

ICESCR	INDIAN CONSTITUTION	RIGHT
Article 7 (a) (I)	Article 39 (d)	Prescribing equal pay for equal work
Article 7 (b)	Article 42	Ensuring just and humane working conditions
Article 10 (2)	Article 42	Providing for maternity relief
Article 6 (1)	Article 41	Providing right to work
Article 10 (3)	Article 39 (f)	Protecting children and youth against exploitation
Article 13 (2) (a)	Article 45	Mandating free and compulsory education for children
Article 7 (a) (ii)	Article 43	Providing work conditions that ensure a decent standard of life
Article 11	Article 47	Ensuring an adequate standard of living and public health

the right to everyone to education.”).

322. *International Covenant on Economic, Social and Cultural Rights*, *supra* note 22, pt. II, art. 2, para. 1.

323. *See supra* notes 52-59 and accompanying text (discussing the Directive Principles of State Policy).



The Supreme Court of India has incorporated into fundamental rights some of the Directive Principles listed above. For example, in *Francis Coralie Mullin v. Union Territory of Delhi*,<sup>324</sup> the Court declared that “the right to life includes the right to live with human dignity and all that goes along with it, namely, the bare necessities of life such as adequate nutrition, clothing and shelter over the head.”<sup>325</sup>

#### D. INTERNATIONAL HUMAN RIGHTS LAW HAS INFORMED INDIAN CONSTITUTIONAL JURISPRUDENCE

The protection of human rights by domestic courts is perhaps the most effective method of strengthening human rights in the world. Indeed, “[j]udges and lawyers have a duty to familiarise themselves with the growing international jurisprudence of human rights. So far as they may lawfully do so, they have a duty to reflect the basic norms of human rights in the performance of their duties.”<sup>326</sup> In a number of common law countries, domestic courts refer to international treaties ratified by their country as a source of guidance in constitutional and statutory construction, as well as in the development of the principles of the common law.<sup>327</sup> In India, such international influences are recognized and admitted. The Supreme Court of India has often cited international declarations and treaties in support of its interpretation of the Constitution.

In *Prem Shankar v. Delhi Administration*,<sup>328</sup> the Court ruled that freedom from undue restraint and handcuffing fell within the wide ambit of Article 21 of the Constitution. Significantly, the Court emphasized that it would not forget the “core principle[s]” found in Article 5 of the Universal Declaration of Human Rights, and Article 10 of the ICCPR.<sup>329</sup> In *Sheela Barse v. Secretary, Children’s Aid Soci-*

---

324. A.I.R. 1981 S.C. 746, 753.

325. *Id.* at 753.

326. Sripati, *supra* note 14, at 130 (citing HARARE DECLARATION OF HUMAN RIGHTS, *reprinted in* 2 DEVELOPING HUMAN RIGHTS JURISPRUDENCE: A SECOND JUDICIAL COLLOQUIUM ON THE DOMESTIC APPLICATION OF INTERNATIONAL HUMAN RIGHTS NORMS 9, 12 (1989)).

327. *See, e.g.*, *Newcrest Mining Ltd. v. Commonwealth of Australia*, 1997 Aust. High Ct. LEXIS 52, 338 (citing Universal Declaration of Human Rights).

328. A.I.R. 1980 S.C. 1535.

329. *Id.* at 1537.

ety,<sup>330</sup> a case involving child abuse, the Court reminded the Indian government that as a signatory it has an obligation to implement the ICCPR provisions.<sup>331</sup> In a more recent decision, the Court articulated the right to compensation for the unlawful deprivation of Article 21, pointing out that such a construction was in accord with the ICCPR.<sup>332</sup>

The Court has also used environmental norms to support its interpretations of the Constitution.<sup>333</sup> All of these decisions reflect the Court's keen awareness of India's international obligations and the Court's predilection to use international human rights and environmental norms to inform Indian constitutional law.

#### E. USE OF CUSTOMARY INTERNATIONAL LAW

Analogizing English common law, the courts in British India applied common law doctrines in many fields.<sup>334</sup> Since the Constitution provides for the continued operation of the law in force immediately preceding its commencement,<sup>335</sup> there is arguably no change even after independence, and courts are free to incorporate customary international law into India's municipal law.<sup>336</sup> While the Court has used United Nations declarations and treaties as sources of guidance in interpreting the Constitution, it has rarely resorted to using principles of customary international law to establish independent rules of decision in its cases. For instance, although the prohibition of torture

---

330. A.I.R. 1987 S.C. 656.

331. See *Sheela Barse v. Secretary, Children's Aid Soc'y*, A.I.R. 1987 S.C. 656, 658 (citing Article 24 of the ICCPR).

332. See *Nilabati Behera v. Union of India*, A.I.R. 1993 S.C. 1966.

333. See *Sripati*, *supra* note 14, at 128-29 (discussing *M.C. Mehta v. Union of India and Law Society*, where the Court cited to United Nations resolutions and conference records as justifications for carving an environmental dimension to Article 21 of the Constitution).

334. See S.K. AGRAWALA, *INTERNATIONAL LAW: INDIAN COURTS AND LEGISLATURE* 12-13 (1965).

335. See INDIA CONST. pt. XXI, art. 372, para. 1, reprinted in VII CONSTITUTIONS OF THE COUNTRIES OF THE WORLD, *supra* note 7, at 1, 258 (concerning the "continuance in force of existing laws and their adaption").

336. See AGRAWALA, *supra* note 334, at 12-13.

is a norm of customary international law<sup>337</sup> and thus, arguably, a part of Indian domestic law, the Supreme Court has made no mention of customary international law in many cases involving prisoners' rights. Rather, the Court has explicitly stated that torture or cruelty is repugnant to the principles of non-arbitrariness, reasonableness, and fair procedure implicit in Articles 14, 19, and 21, respectively, of the Indian Constitution.<sup>338</sup>

In a recent case involving pollution caused by sulfuric acid plants, however, the Court displayed radically new thinking.<sup>339</sup> Such a change opens new vistas for the enforcement of international human rights law and environmental law. Holding that the "polluter-pays" principle is a part of India's domestic law, the Court ordered the respondent chemical companies to compensate the affected individuals and pay for the restoration of the environment.<sup>340</sup> Following the international deliberations culminating in the Earth Summit at Rio in 1992, the Court's premise was that "sustainable development has become an accepted part of customary international law."<sup>341</sup> The Court conceded that although the contours of the concept of sustainable development had not yet crystallized, the polluter-pays principle was clearly its essential feature.<sup>342</sup> The Court reasoned that "a rule of customary international law that is not contrary to domestic law may be deemed to have been incorporated therein."<sup>343</sup> On this basis, the Court concluded that the "polluter pays" principle was an enforceable part of the *corpus juris* of India. The Court also cited the Indian Constitution and various environmental acts to support its decision.<sup>344</sup>

337. See Lillich, *supra* note 295, at 72-73 & n.132 (citing Section 702 of the Restatement (Third) of the Foreign Relations Law of the United States).

338. See, e.g., Sunil Batra v. Delhi Admin., A.I.R. 1978 S.C. 1675, 1690 (outlawing cruelty and torture in prisons pursuant to Articles 14, 19, and 21 of the Constitution, which provide protection against unreasonable restrictions and arbitrary deprivations).

339. See Shanmuganathan & Warren, *supra* note 198, at 399 (discussing *Indian Council for Env'tl. Action v. Union of India*).

340. See *id.*

341. *Id.*

342. See *id.* at 399-400.

343. *Id.*

344. See *id.*

This rationale, however, is not tenable as none of the authorities relied upon by the Court makes any direct reference to the concept of sustainable development or the "polluter-pays" principle. Perhaps the Court adopted this stance because it is neither fashionable nor prudent to admit to the exclusive use of non-domestic laws as bases for a decision. The apparent, albeit faulty, use of the law of the forum is more in keeping with principles of state sovereignty. Nonetheless, this decision is significant for both the international criteria that the Court looked to as a source of domestic law on environmental issues<sup>345</sup> and the great strides the Court has taken in providing effective access, including redress and remedy to protect individuals from the consequences of environmental harm or damage.

It is important to understand that during the framing of Part III of India's Constitution, the founding fathers consciously decided to adopt ideas from foreign sources.<sup>346</sup> During the last five decades, these foreign precepts have had lasting effects on the Indian legal and political culture. Indeed, Indian nationals have not resisted these precepts as alien ideas; rather, they have welcomed them as their own. It is imperative that in the next century, the Indian Judiciary not turn inward in ways that "deny the rich traditions of the rule of law beyond [Indian] borders."<sup>347</sup> The Judiciary must continue to nourish Indian constitutional thought with wholesome international norms and principles.

#### IV. SUPREMACY OF THE CONSTITUTION

In several nations in the world today, the source of legitimacy for liberal democratic values is a written constitution.<sup>348</sup> For India, the

---

345. See Jack Greenberg, *The Widening Circles of Freedom*, 8 HUM. RTS., Fall 1979, at 10, 45 (discussing the use of international legal criteria as sources of United States human rights laws).

346. See *supra* notes 37-59 and accompanying text (discussing the United States and Great Britain's influence on the framing of India's Constitution).

347. Gordon A. Christenson, *Using Human Rights Law to Inform Due Process and Equal Protection Analyses*, 52 U. CIN. L. REV. 3, 35 (1985).

348. *But cf.* British Information Services, *Britain in the USA* (visited Oct. 17, 1998) <<http://www.britain.nyc.ny.us/>> (noting that Britain, unlike other countries, does not have a written constitution set out in a single document); David Winder, *Little Known British Tradition: Secrecy*, CHRISTIAN SCI. MONITOR, Dec. 17, 1986, at 1 (explaining that Britain, in addition to being the "mother of Parliaments, . . .

Constitution was a political symbol memorializing her triumphant struggle for freedom from British rule. As mentioned earlier, India's founding fathers, from the very early days of the freedom struggle, consciously decided to model free India along the lines of a western liberal democracy.<sup>349</sup> Therefore, when independence for India became imminent, they chose to place their faith in a constituent assembly to formulate a constitution that institutionalized their political triumph. The founders set about their task of constitution-making "with a relative purity, with a Rawlsian reflective equilibrium in an effort to do justice to all."<sup>350</sup> The Constitution's commencement in 1950, therefore, heralded a new constitutional dawn into which the Republic was launched: an era of political freedom, freedom from exploitation, and justice—social, economic, and political—to the impoverished and illiterate masses.

Today, on the eve of the fiftieth anniversary of the Constitution, it is appropriate to ponder whether these liberal democratic values and the Constitution as a provenance for those values have gained legitimacy. The answer, sadly, is yes and no. Today, all political parties and citizens share the opinion that a political democracy must be the foundation of the Indian State.<sup>351</sup> In Republican India, democracy has found a hospitable soil, electoral legitimacy has been a fundamental requirement for political survival, the Indian army has remained apolitical, and the judiciary has, of late, come to exercise its constitutional powers with verve and aplomb. While these are heartening features of the Indian polity, they constitute only a part of the story of constitutionalism in India. However, the Constitution, in the sense of the supreme law of the land, as a settled consensus accepted by all shades of political opinion, is not yet entrenched in the Indian political-legal soil. The process may have begun, but some of its vaunted features, such as the parliamentary form of government, socialism,

---

also laid the foundations for representative democracy and individual liberty with the signing of the Magna Carta in 1215").

349. See *supra* notes 40-41 (discussing India's rejection of the United States presidential system).

350. Rajeev Dhawan, *Amending the Constitution*, HINDU, May 8, 1998.

351. See, e.g., YOGENDRA K. MALIK & V.B. SINGH, HINDU NATIONALISTS IN INDIA: THE RISE OF THE BHARATIYA JANATA PARTY 38 (stating "the BJP leadership . . . committed itself to nationalism and national integration, democracy, positive secularism, and value based politics").

secularism, and legitimate rights of minorities, have become debatable and abrasively so.

Furthermore, since 1950 India's politicians have slowly destroyed the institutional morality required to make the parliamentary system work.<sup>352</sup> Akin to bad workmen who blame their tools, they frequently have resorted to tampering with the Constitution rather than reflecting on their dismal performance and disciplining their own lawless behavior.<sup>353</sup> Indian politicians' actions therefore parallel South Asian politicians' actions, resulting in the usurpation of constitutionalism by those in power.<sup>354</sup> In India, the tragic consequence of this political culture is a steady stream of amendments in the name of progress that have mutilated the Constitution. One eminent scholar writes: "Sometimes [the constitutional amendments] have been for the better; sometimes, for the worse. [Today, w]ith 78 changes, the Constitution has almost been declared a periodical, whose fate has been determined by prime ministerial editors and judicial sub-editors."<sup>354</sup>

In the first twenty-five years of its existence, the Constitution was amended almost forty times.<sup>356</sup> The controversial amendments during this period related primarily to the fundamental right to property since it was this right that dominated litigation before the Supreme Court.<sup>357</sup> During those days, the Court aligned itself with the propertied classes and displayed an excessive zeal to protect property rights. The executive exploited this situation to its advantage. It portrayed the Constitution and the Court as obstacles in changing structures of economic power. The executive utilized this portrayal to further justify its constitutional amendments and populist pro-

---

352. See Editorial, *Rebuilding India*, HINDU, Apr. 10, 1997.

353. See *id.*

354. See Coomaraswamy, *supra* note 221, at 160 (noting how the use of constitutions is instrumental for those who wield state power).

355. Dhawan, *supra* note 350.

356. See THOMAS, *supra* note 307, at 86 (stating that "[t]he Indian constitution is easily amended following the passage of the 42<sup>nd</sup> Amendment in 1976 during the Emergency, the Indian Supreme Court determined that nothing in the Indian Constitution is beyond the amendment process, not even fundamental rights.").

357. See *supra* notes 151-55 and accompanying text (discussing property rights litigation and amendments).

grams.<sup>358</sup> What ensued were ominous developments: “assaults on the independence of the judiciary,” vitriolic parliament-judiciary “confrontation,” and an erosion of the judiciary’s image in the public eye.<sup>359</sup> Until the mid-1970s, the Indian citizenry viewed the Supreme Court as a bastion of the rich and wealthy. Essentially, the Court lacked legitimacy and a solid foundation of support by the people—something that it enjoys today. The ideology of constitutionalism as spelled out by the courts was slowly but surely discredited in the eyes of the public. During times of crisis, as in 1975 when Indira Gandhi unilaterally declared Emergency and subverted the constitutional processes to remain in power, the Court sadly lacked the legitimacy to reinforce the supremacy of the Constitution.<sup>360</sup> It had miserably failed thereby to deliver its most solemn constitutional function.

Constitutional amendments enacted during the period of 1975 to 1995 reflect both a subversion of constitutional processes by politicians for personal aggrandizement and a concern to safeguard the Constitution’s efficacy from the growing trend of legislators’ lawlessness. The Emergency’s notorious Forty-second Amendment symbolized the former trend,<sup>361</sup> while the post-Emergency’s historic Forty-fourth amendment—designed to undo the damage inflicted by the Forty-second Amendment—represented the latter trend.<sup>362</sup> Un-

---

358. See generally AUSTIN, *supra* note 50, at 98-101 (discussing the problems encountered in establishing fundamental rights for Indian citizens); DAS, *supra* note 147, at 29-63 (discussing the Parliamentary-judiciary controversy over the property rights).

359. See Dhawan, *supra* note 350 (“Nehru and Indira Gandhi were uncompromising resulting in confrontations with the Judiciary, assaults on the independence of judges and judicial confrontation in the form of the nebulous ‘basic structure’ of 1973 . . .”).

360. See *Worst Legacy of India Persists*, *supra* note 27 (opining that India “ceased to be a democracy” during Indira Gandhi’s Emergency).

361. See THOMAS, *supra* note 307, at 81 (noting that “[t]he 42<sup>nd</sup> Amendment suspended the writ of habeas corpus and made the reasons for preventive detention state secrets”). Therefore, “during the 1975-77 Emergency, a citizen could not appeal to the courts because he did not now the reason for his arrest and the government did not have to disclose it.” *Id.*

362. See *id.* at 82, 83 (stating that the 44<sup>th</sup> Amendment repealed the 42<sup>nd</sup> Amendment by declaring that Article 21 could not be suspended during emergencies and by rejecting “the 42<sup>nd</sup> Amendment’s term ‘internal disturbance’” and rein-

fortunately, the Forty-fourth Amendment was not a spectacular success, and the successive governments—including the current one—have not implemented some of its provisions liberalizing preventive detention.<sup>363</sup> Legislators of the Rajiv Gandhi-era of the mid-1980s enacted the much-hyped Anti-Defection (Fifty-second Amendment) Act with the ostensible purpose of checking defections and “floor-crossing” by parliamentarians.<sup>364</sup> Like many other laws on the statute book, it was rendered otiose because of the political maneuverings of politicians of all hues.

#### A. SHADES OF FASCISM—THE CURRENT PROPOSALS FOR AMENDING THE CONSTITUTION

“Constitutional amendments are no purer than the politics which animates them.”<sup>365</sup> “[They] are mischievously conceived, deviously designed and mal-interpreted in a partisan manner even if interlaced with genuine concern.”<sup>366</sup> Viewed in this light, the BJP government’s proposals for three major constitutional changes are anything but politically neutral.

The BJP’s first proposal is to abandon the current parliamentary form of government and to opt for a pattern akin to the presidential form in order to ensure that the Prime Minister is not rendered a lame duck by a hung Parliament.<sup>367</sup> This is yet another classic instance of usurpation of constitutionalism, whereby crafty politicians lusting for unfettered powers project the Constitution as an obstacle to providing stable governance. This stability slogan is less than convincing,

---

roducing “the term ‘armed rebellion’ as the justification for the declaration of emergency”).

363. *Id.* at 83 (criticising the Janata Party’s extensive emergency powers despite the repeal of the 42<sup>nd</sup> Amendment in 1979); Dhawan, *supra* note 350 (“To this day, the liberal preventive detention amendments of 1979 have not been implemented with a helpless Supreme Court surrendering the issue to political cowardice.”).

364. *See* Dhawan, *supra* note 350.

365. *Id.* *See, e.g.,* V. Krishna Ananth, *Women’s Bill and OBC Politics*, HINDU, July 15, 1998 at 13 (analyzing the politics surrounding the recent Women’s Reservation Bill, the proposed eighty-third constitutional amendment, dealing with reservation of seats for women in Parliament).

366. Dhawan, *supra* note 350.

367. *See id.* (stating “[t]he first change is to ensure longer, stable terms for the Prime Minister, even if it means moving to some form of a presidential system.”).



singularly hollow, and has an ominous ring to it. Taken to its logical conclusion, such sentiments and fears pave the way for totalitarianism. Those conversant with world history cannot ignore the striking similarity between the reality facing India, and what Benito Mussolini and his fascist brigade—the black shirts—accomplished in Italy by conjuring up the specter of fear and recommending the concentration of power in the hands of the “wise.”<sup>368</sup> There can be no doubt that if the proposal for a presidential pattern captures the imagination of the gullible and ignorant section of the public, the BJP and its saffron brigade will have the potential to perpetrate a disaster much greater in magnitude than what Mussolini accomplished in Italy.

Other practical reasons also render this proposal an unsound one. First, after much deliberation, India’s founding fathers opted for a parliamentary system since it proved successful prior to independence in some of the provinces under the Government of India Act, 1935.<sup>369</sup> Second, separation of powers between the executive and legislature is the hallmark of a presidential democracy. In India, however, given the deep divisions in the Lok Sabha—the house of the people—there is the potential for an utter breakdown of consultation and debate in Parliament, leading to legislative paralysis and paving the way for usurpation of all power by the Executive. The consequences of such a scenario would affect the very life of the Republic, as well as the country’s stability.

The second proposal for change is targeted toward the judiciary to render it toothless. The BJP government is currently sounding a shrill and false alarm of judicial dictatorship and tyranny, and is unfairly indicting the Supreme Court’s judicial activism.<sup>370</sup> India’s current crop of criminal politicians and politicized criminals are making these devious attempts to discredit the Judiciary only to avoid personal accountability. In this era of unabated greed, the courts have

---

368. See C.R.S. HARRIS, *ALLIED MILITARY ADMINISTRATION OF ITALY 1943-1945*, at 48 (1957) (attributing the killing of fascism to the fall of Mussolini). “Many of the best known elements in the country had at one time been drawn to it [fascism] and, for fear of worse, had often given it their passive support.” *Id.*

369. See Alladi Kuppaswami, *A Remedy worse than the Disease*, HINDU, July 16, 1998, at 12 (stating the case for a parliamentary, rather than a presidential, system in India).

370. See Dhawan, *supra* note 350 (arguing against “tinker[ing] with judicial review”).

fearlessly upheld the rule of law<sup>371</sup> and brought to the dock an array of public officials including a former Prime Minister, several ex-governors, ministers, and bureaucrats.<sup>372</sup> Therefore, any attempt to curtail the Judiciary's legitimate role in the polity would destroy the two fundamental correlatives of constitutionalism, vis-à-vis legal limits to arbitrary power and the complete political responsibility of the government to the governed.

The third proposal concerns the powers of the central government to impose "President's Rule" under Article 356 of the Constitution.<sup>373</sup> Under Article 356 of India's Constitution, the federally appointed governor can recommend the dismissal of a state's elected legislature and the imposition of direct rule from the central government when "governance of the state cannot be carried out in accordance with the constitution."<sup>374</sup> The numerous instances of the obscene use of Article 356 to settle political scores by the ruling party at the central government constitutes yet another illustration of the debasing of a cardinal constitutional value—federal fair play.<sup>375</sup> The framers of the Constitution had envisaged state governors to be non-partisan men and women of eminence, truly "senior" citizens. Unfortunately, successive governments run by the Congress Party have contributed to

371. *Id.* (stating that the judiciary "has stepped in to ensure that institutions of governance, in these troubled times, at least meet the discipline of a widely construed rule of law").

372. *See supra* notes 241-45 and accompanying text (discussing instances of Official corruption).

373. *See* THOMAS, *supra* note 312, at 75, 89-97 (providing a thorough discussion of "President's Rule"). When the Governor of a State is satisfied that there is a constitutional breakdown in the state, he can advise the President to dissolve the state legislature and bring the state directly under the President's rule. *See id.* This is called state emergency or "President's Rule." *See id.*; *see also* INDIA CONST. pt. XXVIII, art. 356, *reprinted in* VII CONSTITUTIONS OF THE COUNTRIES OF THE WORLD, *supra* note 7, at 1, 235 (detailing the provisions in case of failure of constitutional machinery in the States). *Cf.* R. Krishnakumar, *Article 356 Should Be Abolished*, FRONTLINE, July 17, 1998, at 24 (interview with Justice V.R. Krishna Iyer, former judge of the Supreme Court) ("[S]peaking for myself, Article 356 deserves to be abolished . . .").

374. INDIA CONST. pt. XXVIII, art. 356, *reprinted in* VII CONSTITUTIONS OF THE COUNTRIES OF THE WORLD, *supra* note 7, at 1, 235.

375. *See* Krishnakumar, *supra* note 373, at 25 (providing Justice Iyer's opinion that "in over 100 cases, starting with the outrage perpetrated in Kerala in 1959, there has never been a legitimate use of Article 356").

the rampant politicization of the gubernatorial posts by appointing servile individuals with strong party loyalties.<sup>376</sup> Inevitably these individuals have, at the slightest instance of trouble in their states, dashed off a communication to the President recommending dissolution of the state legislature and declaration of president's rule. In the past, several state governments ruled by parties others than the one at the central government have been ousted by the President on patently flimsy grounds.<sup>377</sup> Imposing President's Rule entails suspension, however temporary, of the people's right to govern themselves. Therefore, there can be no doubt that the framers of the Constitution reserved the invocation of this article only for the rarest of instances.<sup>378</sup> In this regard, the Supreme Court's decision in *S.R. Bommai v. Union of India*<sup>379</sup> is indeed welcome. In *Bommai*, the Court sharply limited the powers vested in the central government to dismiss a state government and articulated the conditions under which state governments may be dismissed.<sup>380</sup> In essence, this majority decision overturned the long tradition of holding Article 356 unamenable to judicial review. It remains to be seen how the present government will try to skirt this decision of the Court.

## B. UPHOLDING CONSTITUTIONAL SUPREMACY

*Kesavananda Bharati* is a significant landmark in the history of Indian constitutionalism for it was in that case that the Supreme Court reaffirmed the supremacy of the Constitution vis-à-vis Parliament and the Executive.<sup>381</sup> Essentially, what the Court did was to re-

---

376. *See id.*

377. *See id.*

378. *See* Sukummar Muralidharan, *Of President's Rule and Trigger-happy Politicians*, FRONTLINE, July 17, 1998, at 26 (interview with Rajeev Dhavan, Senior Advocate in the Supreme Court) ("President's Rule is supposed to be invoked when there is a breakdown of the constitutional machinery – in other words, a paralysis so severe that it is impossible for the State government to handle it in any way.").

379. A.I.R. (1994) 3 S.C.C. 1.

380. *See id.*; Rajendra Prasad, *Bommai Verdict Checked Misuse of Article 356*, FRONTLINE, July 17, 1998 (Interview with Justice B.P. Jeevan Reddy) (stating that, before *Bommai*, Article 356 was often used "indiscriminately" and was exercised in more than 90 cases, most of which were of "doubtful constitutional validity").

381. A.I.R. 1973 S.C. 1461.

pudiate Parliament's assertion of sovereign power to make changes not *in* the Constitution, but *of* the Constitution.<sup>382</sup> "No party in power could use its legislative majorities to abuse the constitutional processes to convert a Republican India into a hereditary monarchy, a secular India into a theocratic state, a federal India into an unitary state, an India with citizens into an India consisting only of subjects."<sup>383</sup> The Court reiterated the principle of constitutional supremacy by articulating the doctrine of the Constitution's "basic structure." The Court placed on high ground and beyond the reach of Parliament's power of amendment, the Constitution's cardinal features such as judicial review, rule of law, democracy, and secularism. The issue before the Court was the validity of certain controversial constitutional amendments that ousted the Court's jurisdiction over certain matters pertaining to the right to property. The Court held that judicial review was indubitably fundamental and part of the Constitution's basic structure, and therefore Parliament cannot, even by amendment, deprive the Court of its constitutional power of reviewing laws that purportedly fulfill the socialist aims of the Constitution, but in practice transgress citizens' fundamental rights.<sup>384</sup> The following passage best summarizes the far-reaching implications this decision holds for the people of India:

This historic judicial intervention is no judicial meandering for the consumption and manipulation by skilled law-persons. It has a structural message for the people of India in their struggle to make power respond more amply to the tasks of justice. For the atisudras, (untouchables) the social and economic proletariat, the reaffirmation of the unchangeable basic structure does not merely mark the limits of the power of the state but also the maintenance of civil and political space within which they can continue to articulate their struggle against the dominating groups.<sup>385</sup>

---

382. See BAXI, COURAGE, CRAFT AND CONTENTION, *supra* note 147, at 66.

383. *Id.*

384. See *Kesavananda*, A.I.R. 1976 S.C. at 276.

385. Upendra Baxi, *Dialectics of the Face and the Mask*, 35 J. INDIAN L. INST. 1, 6 (1993).

### C. IS THE "BASIC STRUCTURE" DOCTRINE THE LAST HOPE?

*S.R. Bommai* demonstrates that successive generations of judges have remained faithful to the concept of constitutional supremacy.<sup>386</sup> The Court held that since secularism was a basic feature of the Constitution, any actions of the government that undermined this principle would be unconstitutional.<sup>387</sup> Until *Kesavananda*, courts used the basic structure doctrine to test the validity of constitutional amendments. Whereas today, under *Bommai*, rulers must keep in mind the basic structure doctrine even while exercising constituent power.<sup>388</sup> This is indeed a powerful determination by the Court and a major breakthrough. The Court must be commended for reestablishing the Constitution's supremacy and reaffirming secularism as the unalterable feature of the Indian Constitution and polity.<sup>389</sup> Notwithstanding criticism that the basic structure doctrine is vague,<sup>390</sup> it is the only bulwark to prevent the basic tenets of a liberal social justice constitution from being totally obliterated. Scholars elsewhere have correctly concluded that this doctrine is not as deleterious as it is made out to be, and that the real crisis is one of values and of unacceptable standards of behavior.<sup>391</sup>

In the present situation, there is no need to review the Constitution. Rather, Parliament needs to make reforms in electoral practices and undertake measures to obliterate the criminalization of public life. Furthermore, men and women with character and principles are required to run the institutions of governance and to infuse them with strength and vitality to meet the current crisis of constitutionalism in

386. *S.R. Bommai v. Union of India*, (1994) 3 S.C.C. 1.

387. *See id.* at 12.

388. *See* Muralidharan, *supra* note 378 ("what *Bommai* said is that the preservation of the basic structure is a constitutional duty.").

389. *See* Prasad, *supra* note 380 (arguing that, in the *Bommai* decision, the Indian Supreme Court promoted constitutional principles by clarifying the intent behind Article 356).

390. *See* Dhawan, *supra* note 350; *see generally* BAXI, COURAGE, CRAFT AND CONTENTION, *supra* note 147, at 62-66 (analyzing the "basic structure" doctrine as interpreted by the Court in *Kesavananda*).

391. *See, e.g.*, Dhawan, *supra* note 350 (stating "constitutional reforms are not the panacea").

India.<sup>392</sup> That alone will make the Constitution work. Nothing else will suffice.

## V. HOW CAN CONSTITUTIONALISM BE STRENGTHENED IN INDIA?

### A. THE JUDICIARY AND THE SOCIAL ACTION LITIGATION MOVEMENT

If the history of the amendment process in India represents the usurpation of constitutionalism, then the SAL movement and its successes represent the “innovative use” of constitutional ideologies.<sup>393</sup> The salutary consequence of such innovative use has been the strengthening and enhancement of liberal values. Indeed, over the last two decades, the ideology of constitutionalism has received renewed vigor through the efforts of SAL. In 1979, eminent scholar Dr. Upendra Baxi presciently wrote on the newly emerging role of the Supreme Court:

The politics of the [Supreme] Court — be it the purest politics or constitutional adjudication or the hurly burly politics of power-sharing at times, power-grabbing at others — represents the best hope for the millions of Indians for a new constitutional dawn. All in all, SAL symbolises the politics of liberation: the ruled and misruled have added to the might of adult franchise the quiet dignity of constitutionalism in their struggle against the myriad excesses of power.<sup>394</sup>

The following two passages capture the role that the Judiciary, as compared to other institutions of governance, plays in the polity twenty years later:

---

392. See also *id.* (stating “[a]part from the shadow of the basic structure doctrine . . . our real problem is the basic lack of honesty across groups and mass lumpenisation in all parties in virtually every conceivable way.”); Lyla Bavadam, *Strengthen the Institution of the Governor*, FRONTLINE, July 17, 1998, at 27, 29 (interview with Fali S. Nariman, regarded as one of India’s top lawyers) (“We cannot expect the judiciary to resolve all the problems of the country and they should not . . . .”).

393. Coomaraswamy, *supra* note 221, at 57.

394. Baxi, *supra* note 160, at 45.

The judiciary is becoming formidable and asserting its place under the sun. The most important development in the past two-and-a-half decades in the Indian legal system has been the emergence of the superior judiciary as an institution with a pivotal creative role in shaping the other constitutional institutions. If the judiciary is allowed to go the way of the other institutions we will have nothing left in the country.<sup>395</sup>

When aggrieved citizens raise grave constitutional issues and exercise their fundamental rights in invoking its jurisdiction, the Supreme Court is left with little choice but to act in deference to its constitutionally prescribed obligations. This is the reason why the Court has had to expand its jurisdiction by, at times, issuing novel directions to the executive; something it would never have resorted to had the other two democratic institutions functioned in an effective manner.<sup>396</sup>

The SAL strategy has become a powerful weapon of social and political accountability. Recognizing the crucial role of SAL, Soli Sorabjee, India's recently appointed Attorney General, stated that in his new position he would make "government departments understand that in sensitive public litigation cases, the government should not play the role of an adversary but cooperate with the petitioner and the court to ensure that human rights of the disadvantaged and oppressed are protected and promoted."<sup>397</sup>

In the early eighties, SAL's predominant concern was championing the cause of bonded and child laborers, contract and migrant workers, rickshaw pullers, slum dwellers, children languishing in jails, and victims of custodial violence.<sup>398</sup> In recent years, SAL has become a potent instrument in exposing and checking the venality of public officials, arbitrary and mala fide actions of government officials for private gain, and the unholy nexus between politicians, bureaucrats and businessmen in India.<sup>399</sup> The Supreme Court's activist

---

395. *Judiciary Asserting its Place: Venkatachaliah*, HINDU, Oct. 9, 1997, at 11.

396. Haresh Khare, *Judicial Activism: The Good and the Not So Good*, HINDU, Mar. 2, 1997, at 11.

397. Sabina Sehgal Saikia, *Sorabjee will Advise Government on Urgent Constitutional Amendments*, TIMES OF INDIA, Apr. 9, 1998.

398. See *supra* notes 249-55 and accompanying text (analyzing cases decided by the Court regarding treatment of disadvantaged people).

399. See *supra* notes 241-45 and accompanying text (analyzing corruption cases

role serves to promote accountability at the higher levels and ensure the fair and judicious exercise of power. Many warriors on the SAL battlefield are social and legal activists and journalists who rightly believe that only "PIL can expose graft in high places," that PIL is the "the only way to fight the mighty," and that it will thereby "ensure accountability which is paramount in public life."<sup>400</sup> It was a PIL petition that exposed the alleged bribing of members of Parliament during the no-confidence motion by then Prime Minister P.V. Narasimha Rao. This case is currently before the Delhi High Court.

Another PIL case concerned the out-of-turn petrol pump allotment case, which led to a Minister being fined for his mala fide decisions taken in office.<sup>401</sup> Yet another petition spurred the Court to issue directions to the government to establish consumer courts in every district of the country.<sup>402</sup> Baxi comments on the movement's success:

The SAL processes have put [holders of executive power] in unpredictable difficulties that the traditional political processes leave no scope, tactics or tools to combat. The SAL is not merely exposé litigation; it literally takes the mask off the face of power which does not want to be held within the law, power that is colonially repressive and at times openly brutal.<sup>403</sup>

Current debates focus on crude attempts to limit the SAL movement by imposing a fee for each PIL case and introducing legislation to regulate PIL.<sup>404</sup> Some critics have accused judges of exercising bias in selecting cases and choosing their litigants.<sup>405</sup> The Court's detailed directives to the Executive, and its involvement in the implementation of its orders, have led to criticism that the Court is actually taking over the administrative function and violating the doc-

---

exposed through SAL activities).

400. Mitra & Chakravarty, *supra* note 241, at 26.

401. *See id.*

402. *See id.*

403. Baxi, *supra* note 385, at 9-10.

404. *See* Mitra & Chakravarty, *supra* note 241, at 23; *see also* Khare, *supra* note 396, at 11.

405. *See* S.K. AGRAWALA, PUBLIC INTEREST LITIGATION IN INDIA: A CRITIQUE 17, 26 (1985).



trine of separation of powers.<sup>406</sup> The courtroom today might be a forum for arraignment of the political class under the guise of Public Interest Litigation. Some say Public Interest Litigation has transmuted into "Publicity Interested Litigation" and "Political Interest Litigation."<sup>407</sup> While some of these concerns are legitimate, all those concerned must oppose any demand for the banishment of SAL. While it is true that judges are no *imperium in imperio*, charges of judicial dictatorship and terrorism are baseless. An open-minded response by the Court to the legitimate criticism that it has evoked is, however, imperative. Some suggestions of strengthening the Court's post-judgment monitoring and the cautious use of the Court's contempt power merit serious consideration in this regard.<sup>408</sup>

Measures must be taken to cut the High Courts' and the Supreme Court's overwhelming caseloads. Modernizing the judicial infrastructure at all levels of the judiciary with photocopiers, tape recorders, computers with Internet connections, and other gadgets, will allow the Judiciary to effectively take on the challenges of the twenty-first century.

During the Republic's opening decades, the Judiciary diminished its legitimacy, and that of the Constitution and constitutional processes, by siding with the landed gentry, sympathizing with elite concerns, and safeguarding elite rights such as the right to property. In fact, until the very last days of the Emergency, society had no faith in the constitutional process; rather it saw the process as favoring the propertied classes while ignoring the plight of the poor and down-trodden. Critics attacked the Court for being overly deferential to the executive, and regarded the Court's judgment in *Shivkant Shukla*, the habeas corpus case, as a new landmark in judicial pusillanimity.<sup>409</sup>

In the aftermath of nineteen-month Emergency, the Court began to take people's suffering seriously. The Supreme Court addressed ac-

406. See Khare, *supra* note 396, at 11.

407. Mitra & Chakravarty, *supra* note 241, at 26.

408. See Soli Sorabjee, *Protection and Promotion of Fundamental Rights by Public Interest Litigation in India*, 51 REV. INT'L COMM'N OF JURISTS 31, 37 (1993) (offering suggestions on changes to increase the efficiency and legitimacy of the Court).

409. See A.I.R. 1976 S.C. 1207; see *supra* note 156 (discussing *Additional District Magistrate v. Shivkant Shukla*).

tual struggles taking place in India, and constitutional values became relevant to the citizenry. A heightened legitimacy to constitutional values such as human dignity, social justice, environmental justice, freedom from torture, freedom from exploitation, and liberty of thought and expression followed.<sup>410</sup>

It is true that the judiciary alone cannot wipe the slate of all evils and Judges can err in advancing the rule of law. It is, however, imperative that in the years to come, the Judiciary creatively utilize numerous constitutional provisions to protect important values found in India. Only then can there be the hope of a new constitutional dawn for the illiterate and impoverished masses in India.

### B. CAMPAIGN TO ERADICATE ILLITERACY

The great strides India has made in providing higher education are matched only by its conspicuous failure to universalize primary education. This fact is tellingly revealed in a report that ranks India as one of the most illiterate and least gender sensitive countries in the South-Asian region.<sup>411</sup> It is a shame that on the eve of the fiftieth anniversary of the Indian Constitution, its mandate to the State, namely, "to provide within a period of ten years" from its commencement, "free and compulsory education for all children,"<sup>412</sup> has remained a chimerical claptrap. The report also rightly warned of a catastrophe if the region fails to universalize basic education within the next five years.<sup>413</sup> For too long, poverty has been blamed for all the social ills afflicting society. In fact, there are several countries much poorer than India that have strikingly higher literacy rates, including Kenya,

---

410. See *supra* Pt. II.A (discussing the role the Indian Supreme Court played in expanding Indian's fundamental rights).

411. See *Largest Number of Adult Illiterates in India: Report*, XINHUA NEWS AGENCY, Apr. 4, 1998, available in LEXIS, News Library, Curnws File (discussing South Asia Human Development Report for 1998) [*hereinafter Literacy Report*].

412. INDIA CONST. pt. IV, art. 45, reprinted in VII CONSTITUTIONS OF THE COUNTRIES OF THE WORLD, *supra* note 7, at 1, 79.

413. See *Literacy Report*, *supra* note 411 (noting further that the region has "slipped behind all other regions of the world including subsahara in human development levels").

Rwanda, and Vietnam.<sup>414</sup> In India itself, however, in the State of Kerela, the Communist party successfully achieved a one hundred percent literacy rate among its population.<sup>415</sup> Thus, India should model itself after the State of Kerela and disallow political indifference in the area of education to ruin India.<sup>416</sup> Indian governments have prioritized limiting their actions and concerns to higher education. Specifically, the government has granted large subsidies to state universities and colleges.<sup>417</sup> Consequently, the state has denied basic education to the vast majority of the poor who lack money and liberally subsidized the education of those who have money.<sup>418</sup>

The Indian government must immediately jettison this misguided approach. The government needs to significantly increase spending on primary education, and progressively withdraw many of the subsidies granted to public universities. In particular, the government should leave the responsibility of higher education to the marketplace and take full responsibility over the provision of primary education. A national movement led by non-government organizations and the thoughtful citizens should be launched to exert pressure on the government to implement the Constitution's mandate. The mere addition of education to the list of fundamental rights in the Constitution, however, cannot help attain the goals of universal elementary education in the country. Legally sanctioning officials may advance educational priorities and policies in India. Yet the country will not be fully literate and well educated until the leadership and citizenry undertake a massive campaign for the eradication of illiteracy.

In the next millennium, democratic institutions may face heavy criticism if insecurity and frustration with ineffective government

---

414. See Kaushik Basu, *Paying for Education*, INDIA TODAY, Nov. 17, 1997, at 25 (asserting that, while India excels in higher education, primary education has thus far been a "failure").

415. See Kenneth J. Cooper, *In India's Kerala, Quality of Life is High but Opportunity is Limited*, WASH. POST, Jan. 3, 1997, at A35 (discussing the State of Kerala).

416. See Basu, *supra* note 414 (arguing that the Indian Government must act to improve the nation's education system).

417. See *id.* (suggesting that the Indian Government must end its huge subsidies to state universities and colleges).

418. See *id.* (recommending that higher education be left to the marketplace).

continues to toll in India. Authoritarianism and fascist formations are more likely to thrive among an illiterate and ignorant populace than among an educated citizenry. Therefore, if the government universalizes basic education, India's economic and social development would accelerate and its survival as a functioning democracy would be more certain.

### C. NATIONAL SECURITY AND FUNDAMENTAL RIGHTS

Grave human rights violations in various parts of India such as Assam, Kashmir, and Punjab, have been swept under the statist rug in the name of national security.<sup>419</sup> With the anti-minorities, particularly anti-Muslim, rhetoric running high in the prevailing vicious political climate, it is arguable that the government can, under the guise of ridding the country of "traitors" and "outsiders," imperil the lives and properties of minorities.<sup>420</sup> To ensure the nation's security and integrity, the law must be enforced against persons who are admittedly terrorists and unquestionably engaging in subversive acts.<sup>421</sup> Vigilance in anti-terrorist enforcement, however, should not ensnare individuals viewed as terrorists due to their membership in minority religious groups. In fact, "figures furnished by the Union Home Ministry in October 1993 show that over 50,000 humans were tormented with Tamil Nadu Prevention detention, while the rate of conviction was a petty 0.81 per cent."<sup>422</sup> While debunking this myth, former Chief Justice Venkatachaliah, emphasized that "national security and human rights are not antithetical, and efforts should be made to combine them for the larger benefits of the nation as well as citizens."<sup>423</sup>

---

419. See, e.g., Kuldip Nayar, *Illegal Detentions in J & K (Jammu & Kashmir)*, HINDU, May 28, 1998, at 10 (discussing human rights violations in Kashmir).

420. See, e.g., *Interview with Bal Thackeray, the leader of the Shiv Sena party*, TIMES OF INDIA, Jan. 25, 1993 at 43 (Canadian edition).

421. See *id.*

422. See V.R. Krishna Iyer, *Rowlatt Act, TADA & POTA II*, HINDU, Aug. 4, 1998 at 12. TADA is the acronym for Tamil Nadu Prevention of Terrorist Activities Bill, which allows evidence of a confession by a person before a superintendent of the police into evidence. See *id.*

423. Editorial, *National Security and Human Rights Not Antithetical*, TIMES OF INDIA, Apr. 20, 1998, at 11.

In the future, it is imperative that the Judiciary take an active role in curtailing wrongful detention rather than helplessly surrendering the issue to political cowardice. Having come so far in requiring a reasonable and fair procedure for protecting individual liberty, it would be a great leap forward if the Supreme Court reviews the constitutional provisions pertaining to preventive detention and bolsters the minimal due process laid down therein.<sup>424</sup> Victimized individuals, particularly Muslims, in the name of national security would be an ominous development indeed, and could potentially turn the outside Islamic world against India.<sup>425</sup> Further, aggrieved members from minority communities would be most likely recruited by foreign insurgents.<sup>426</sup>

#### D. A THIRD FREEDOM STRUGGLE?

The Indian Constitution was barely twenty-five years old when it was suspended from June 1975 to March 1977.<sup>427</sup> The Emergency was a second freedom struggle, a turning point for societal institutions and Indian citizens. This event politicized the average citizen and demonstrated the importance of liberal values in a democracy. Additionally, it reminded societal institutions such as the press, the Judiciary, and the opposition parties of their power and responsibilities.<sup>428</sup> The post-Emergency era consequently witnessed a proliferation of social action groups, and an unprecedented assertion of journalistic and judicial power that exposed governmental lawlessness and upheld a widely construed rule of law.

---

424. See Dhavan & Reddy, *supra* note 216, at 183.

425. See M.D. Nalapat, *India's Taliban: Too Many Kooks Spoil the Broth*, *TIMES OF INDIA*, Apr. 29, 1998, at 21.

426. See *id.*

427. See Nanda, *supra* note 157, at 22 (stating that “[a] systemic and steady erosion of the fundamental freedoms guaranteed by the constitution of India began with the imposition of the State of Emergency by the Government of India on June 25, 1975.”).

428. See *id.* at 33 (noting that “[f]ear of arrest for expression of dissident views has severely curtailed public debate in Parliament, in educational institutions, and in various public forums known for lively discussion on political, economic, and social matters before the Emergency.”).

### 1. Case for a Robust Civil Society

Today, two decades later, it is worth pondering what lessons the past has taught and what the future will bring. First, the past demonstrates that freedom is a beckoning goal, requiring everyone to be alert to the possibilities of injustice. Second, history shows that emergency excesses are no different from daily excesses of raw state power on helpless citizens. The difference is not really one of kind but merely one of degree. It is heartening that despite acute poverty, high levels of illiteracy, unemployment, and depressed conditions, a substantial portion of the poor in India are non-militant and have faith in the democratic process.<sup>429</sup> Today, there is a considerable rise in political consciousness among the citizenry especially among the hitherto oppressed, like the untouchables.<sup>430</sup> More notably, the oppressed are increasingly aware that it is only through the democratic process that they have any chance of improving their condition.<sup>431</sup> The emergence of this sustained faith in the democratic process among the governed on the one hand and growing lawlessness among the rulers on the other confirms that the time is ripe to act. Democracy requires strengthening citizen participation and civility, and demanding accountability from the government.<sup>432</sup>

Elsewhere in the world, people from diverse backgrounds have come together to defend democracy and crusade for more equitable development. Examples of such global citizen actions range from Polish workers challenging a totalitarian regime to Argentinian mothers of political prisoners confronting a military dictatorship.<sup>433</sup>

---

429. See Rajni Kothari, *India: The Growing Courage of the Poor*, TIMES OF INDIA, July 28, 1997, at 13.

430. See *id.*

431. See *id.*

432. See Brenda Cossman & Ratria Kapur, *Secularism's Last Sigh?: The Hindu Right, the Courts, and India's Struggle For Democracy* 38 HARV. INT'L. L.J. 113, 141-70 (1997) (discussing secularism and democracy).

433. See Miguel Rodriguez & Rajesh Tandon, *Emergence of Global Civil Society*, 26 U.S.I.A. ELECTRONIC J. 1997 (1996).

## 2. *Bold Action Needed*

Two important correlatives of constitutionalism are: 1) all power derives from the people, and 2) the government has complete political responsibility to the governed. Yet, in India, rampant corruption at all levels of the government caused scores of development projects and economic and social schemes to fail to benefit those they govern.<sup>434</sup> It is therefore imperative that citizens and their organizations assume greater responsibility in monitoring the efficiency of government-implemented policies. Indeed, these groups should launch a vigorous campaign for the right to information. As a result of a sustained campaign undertaken by the Mazdoor Kisan Shakti Sanghathan, a people's organization, the Government of Rajasthan recognized the people's right of access to official documents at the village level.<sup>435</sup> Citizens, government officials, and local government leaders participated in several *Jan sunwai*, public hearings, to examine the implementation of development works, detect frauds, and take remedial actions.<sup>436</sup> These seemingly small victories must be won more frequently in other states as well, since they provide an opportunity to develop internal processes relevant to the actual concerns of the people. The hearings also provide meaningful opportunities for ordinary citizens to break out of the vicious circle of collective apathy and individual hopelessness.

India is a highly diverse society marked by deep social cleavages.<sup>437</sup> Constitutionalism provides Indians with a means to reconcile the competing interests, resolve conflicts, elect representatives, and implement public decisions in a peaceful, civilized, and orderly manner. Constitutionalism caters to the distinct needs of a pluralist society like India. Therefore, if its roots are to be strengthened in India, constitutionalism must evolve from the lower levels through active and collective efforts to protect socio-economic values that have resonance in the Indian sub-continent.

---

434. See Bela Bhatia & Jean Dreze, *For Democracy and Development*, FRONTLINE, Mar. 6, 1998, at 102 (discussing projects that never reached India's low income population).

435. *Id.*

436. *See id.*

437. *See* Kuppaswami, *supra* note 369 (identifying social distinctions in India).

If achieving spectacular successes in strengthening constitutionalism is considered utopian, achieving great advances in this direction are certainly not. Mobilizing citizen participation to translate constitutional values into a living reality and building a robust civil society are steps towards attaining that goal.

### 3. *Secularism in Danger: Bharatiya Janata Party and the Hindutva Agenda*

Several years ago an eminent scientist presciently pointed to the current crisis in constitutionalism when referring to “the danger of a particular kind of sometimes fundamentalist, of othertimes religious orthodoxy erupting within secularism, not simply in opposition to it.”<sup>438</sup> The *Hindutva* agenda, which constitutes the “ideological linchpin” of the BJP, represents this danger erupting within secularism.<sup>439</sup> It is a grave threat to both the secularity of India and the fragile secular fabric of Indian civil society.

What is *Hindutva*? *Hindutva* literally means “Hinduness” but seen in its historical and current political context, is simply a quasi-fascist majoritarian ideology.<sup>440</sup> Premised on the principle of the political, cultural, and religious supremacy of Hinduism, it vociferously advocates the establishment of a *Hindu Rashtra*, a Hindu State.<sup>441</sup> The BJP has deployed *Hindutva* to attack the legitimacy of the collective rights of minorities.<sup>442</sup> Wedded to the formal concept of equality, the BJP regards any special treatment of religious minorities as a violation of secularism.<sup>443</sup> Implicit also in the *Hindutva* agenda is the reinforcement

438. Cossman & Kapur, *supra* note 432, at 113 (citing Homi Bhabha, *Secularism as an Idea Will Change*, HINDU, Dec. 17, 1995, at XIX).

439. *See id.* at 113, 115, 116 (discussing how the Hindu Right, which includes the BJP, has “sought to promote and spread”).

440. *Id.* at 116.

441. *See id.* (stating that the Hindu Right in India, composed of the BJP, Rashtriya Swayam Sevak Sangh (“RSS”), the Vishwa Hindu Parishad (“VHP”), the “militant anti-Muslim Shiv Sena . . . collectively seek to establish a Hindu State in India”).

442. *See id.* at 135.

443. *See* Malik & Singh, *supra* note 351, at 12 (noting that “BJP leaders insist that secularism is natural to Hinduism because it is ‘impossible for the Hindus to evolve an established church or proclaim a state religion and call upon the State to impose it’”).



of Brahmanical superiority through perpetuation of the Brahmanical culture.<sup>444</sup> This is the cultural mainstream into which the rest of the Indians comprising Hindus (non-Brahmins), Dalits (untouchables), Muslims, Sikhs, Christians, and Buddhists are urged to swim and ultimately drown by voluntarily giving up their distinct identities and/or having their identities forcefully obliterated.<sup>445</sup> *Hindutva* thus simply means “the assimilation of all minorities into the majoritarian way of life.”<sup>446</sup> It is “a call to Hindus to unite against these religious minorities; at best it is a call to assimilate these minorities into the ostensibly more tolerant fabric of Hinduism, and at its more extreme it is a call to simply destroy them.”<sup>447</sup>

The real danger of *Hindutva*, however, lies in the insidious way in which it masquerades a singularly non-secular version of secularism and opposes genuine and democratic secularism as “pseudo-secularism.”<sup>448</sup> *Hindutva* has “appropriated [the dominant] discourse of secularism within constitutional law for its own rather non-secular purposes.”<sup>449</sup>

The Supreme Court’s judgment in the *Hindutva* cases<sup>450</sup> constitutes a constitutional debacle in this regard. Despite the current context of *Hindutva*, which is currently a vicious attack on the legitimacy of minorities’ rights, the Supreme Court seriously erred in holding that *Hindutva* represented a way of life in the subcontinent and did not constitute a violation of the Representation of the People Act.<sup>451</sup> One of the effective checks that the Court can exercise to prevent majorities from usurping constitutionalism is to institutionalize minority rights. E.P. Thompson wrote:

---

444. See Nalapat, *supra* note 425.

445. See *id.*

446. Coosman & Kapur, *supra* note 432, at 135.

447. *Id.* at 136.

448. *Id.* at 139.

449. *Id.* at 141.

450. See *id.* at 113 (discussing *Manohar Joshi v. Nitin Bhavrao Patil* and “eleven other cases collectively known as the *Hindutva* cases”).

451. See *id.* at 114 (arguing that the Supreme Court erred in “concluding that *Hindutva* constitutes a way of life of the people of the subcontinent and that it constitutes neither a violation of the prohibition on appealing to religion to gain votes nor a violation of the prohibition on promoting religious enmity and hatred”).

India is not an important but perhaps the most important country for the future of the world. All the convergent influences of the world run through this society: Hindu, Muslim, Christian, Secular, Stalinist, Liberal, Maoist, Democratic Socialist, and Gandhian. There is not a thought that is being thought in the East or the West that is not active in some Indian mind. If that subcontinent should be rolled up into authoritarianism, if that varied intelligence and creativity should disappear into conformist darkness, it would be one of the gravest defeats of the human record, sealing the fate of a penumbra of other Asiatic nations.<sup>452</sup>

Unfortunately, the episodes of the past few months point to the creeping fascism about which E.P. Thompson warned. Recently, the BJP destroyed a progressive artist's house and workshop in response to the artist rendering a Hindu goddess in the nude in an oil-color painting<sup>453</sup> and Shiv Sena men in Mumbai militantly opposed a concert by a noted Pakistani singer.<sup>454</sup> Freedom of expression is thus being squelched in the interest of the ruling party and state defined morality. Official BJP disapproval stemming from puritanical, religious, or chauvinistic biases is now assuming dimensions of cultural terrorism in India.<sup>455</sup> Unchecked, this phenomenon can simply snowball. It is clear that the BJP's *Hindutva* agenda has grave implications for minorities, women, untouchables, and indeed the very fabric of India's civil society and the foundations of the Republic. As one scholar warned, "underneath the [BJP's] mask of moderation remains the steel-hard determination and ruthlessness of the Sangh combine and the RSS." All of this cannot be met with any sense of complacency.

452. NANI PALKHIVALA, *OUR CONSTITUTION DEFACED AND DEFILED* 230 (1981).

453. See Vir Sanghvi, *HINDUISTAN TIMES*, May 12, 1998 at 12 (discussing attack on painting); Editorial, *The "Hidden Agenda" (RAM Temple Issue)*, *HINDU*, May 27, 1998, at 12 (discussing the attack on the painting as evidence that "the BJP is beginning to show its real face").

454. See Editorial, *supra* note 453 (noting that this event was "allowed to be carried out by State machinery").

455. See *id.* (noting that "fears about the BJP's hidden agenda are not just visceral").

456. ACHIN VANAİK, *THE FURIES OF INDIAN COMMUNALISM: RELIGION, MODERNITY AND SECULARIZATION* 347 (1997).

#### 4. Battle Against Hindutva

A secular state in principle without a secularized civil society is bound to decisively undo the former in due course. Sustained efforts to halt the onslaught of *Hindutva* and many other forceful moves toward further secularization of civil society must be made in the days ahead. Societal institutions such as the Courts, the press, NGOs, intellectuals, and professional groups need to rally their forces in this onward march against *Hindutva*.

If past governments have been blind to the injustices against untouchables, migrant laborers, women, and children, then the current air of religious intolerance, cultural nationalism, and cultural correctness, opens up new opportunities for citizens, lawyers, journalists, activists, or public figures to think of the prejudices that need to be confronted. Specifically, all Indians must determine and advocate on behalf of the silent groups and unfavorable minorities today. Additionally, these silent groups must speak up for themselves. Certainly, these groups are not limited to religious minorities, progressive artists, and musicians, but must include lesbians and gays and other groups as well. It is also imperative that the non-BJP parts of the political spectrum and democratic, secular, and progressive forces in particular rise to the challenge. The response must essentially be political, grounded in democratic and progressive mass mobilization. If the Republic is to be saved from the scourge of hate, bigotry, and terrorism, India cannot afford to have short cuts in this fight against the BJP and its *Hindutva* agenda.<sup>457</sup> In fact, pursuant to *Bommai*, the government is under a constitutional duty to act accordingly in light of its basic structure obligations to uphold secularism.<sup>458</sup> Governments that subvert secularism—one of the principal tenets of the Constitution—have no right to constitutional existence.

---

457. See Rajeev Dhavan, *Ayodhya: Stop This Madness Now*, HINDU, June 19, 1998, at 12 (stating that the VHP of which “the BJP is no more than a political arm” is “running riot terrorising Christians and intimidating Muslims”).

458. See *supra* notes 386-91 and accompanying text (discussing *S.R. Bommai v. Union of India*).

## CONCLUSION

Five decades ago, on the eve of independence, on a cold wintry day, India's founding fathers assembled in New Delhi to embark on the solemn task of framing India's founding deed. Having waged a relentless struggle for freedom—not with bayonets and bullets but on the lofty principles of non-violence and truth—they were deeply committed to transforming India into an egalitarian and humane society. Thus, they resolved to constitute India into a sovereign, secular and democratic republic guaranteeing all citizens the following: social, economic, and political justice; liberty of thought, expression, faith and worship; and equality of status and opportunity.<sup>459</sup> It was a momentous political decision for constitutionalism and human rights in history. One can say today that constitutionalism has become part of India's constitutional heritage. Without it, it is doubtful that Indians would enjoy the degree of liberty that they have today.

Half a century after its enactment, the framers' pledge boldly shines in a period made dark by corruption, misrule, and religious bigotry. Yet the usurpation of constitutional values contained in the Preamble and the contention surrounding them are a reminder that their advocacy and robust defense is a task for each succeeding generation of Indians.

At the inaugural session of the Constituent Assembly, Chairman Satchinanda Sinha related to the members the following quote of the great American jurist, Joseph Story: "Republics are created by the virtue, public spirit, and intelligence of the citizens . . . They fall, when the wise are banished from the public councils because they dare to be honest, and the profligate are rewarded, because they flatter the people, in order to betray them."<sup>460</sup>

Joseph Story's wise warning is markedly relevant for Indians today when the Republic stands imperiled from the vice of its leaders and the ignorance and apathy of its citizens.

---

459. *See supra* Pt. I.A (discussing the founding father's framing of India's Constitution).

460. 1 CONSTITUENT ASSEMBLY OF INDIA, 1st mtg. (Dec. 9 1946) (visited Nov. 30, 1998) <<http://alfa.nic.in/debates/vollp1.htm>> (statement of Satchinanda Sinha, Assembly Chairman).